

90-32

Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term, 1990

THE SECRETARY OF THE STATE OF FLORIDA,
and THE STATE OF FLORIDA,

Petitioners,

v.

DIANN WALKER, LOUVENIA JONES, PEARLIE
WILLIAMS, GRACIE HOLTON, ROSA HENDERSON,
DELORES COLSTON, BARBARA KING, DOROTHY
ROBERTS, JACQUELINE ROSS, LINDA ISAAC, AND
CHARLES STEWART.

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

RICHARD M. DUNN
Counsel of Record

BARBARA A. EAGAN
DUNN, DRESNICK & LODISH, P.A.
2400 One Biscayne Tower
2 South Biscayne Boulevard
Miami, Florida 33131
(305) 374-4401

Attorneys for Petitioners



QUESTIONS PRESENTED

1. Under *McDonnell Douglas-Burdine* standards, may a federal court of appeals conduct review following trial and reverse judgment in favor of employer which produced testimonial and documentary evidence to support its contention that it hired the most qualified, because the actual decisionmakers did not testify?
2. After a discrimination case is fully tried on the merits, may a federal court of appeals reverse based on its decision that employer's intermediate stage evidence was inadequate without proceeding directly to determine whether the record supports the trial court's finding on the ultimate issue of discrimination?

PARTIES TO THE PROCEEDINGS

Petitioners here, Secretary of the State of Florida, and the State of Florida were defendants-appellees below. Increase Minority Participation by Affirmative Change Today of Northwest. Florida, Inc., (IMPACT) Inc., on behalf of itself and its members, Diann Walker, Louvenia Jones, Pearlie Williams, Gracie Holton, Rosa Henderson, Delores Colston, Charles Stewart, Barbara King, Dorothy Roberts, were plaintiffs-appellants below. Jacqueline Ross and Linda Isaac were intervenors-appellants below. Clifford Simmons and Margarite Stewart were plaintiffs below. A class of all others similarly situated were designated plaintiffs-appellants below.

George Firestone was the Secretary of the State of Florida in proceedings below. Jim Smith is the current Secretary of the State of Florida. Marguerite Stewart settled her case in the district court. Clifford Simmons was not available for trial. His case was severed and has not been tried.

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Respondents.

Petitioners, the Secretary of the State of Florida and the State of Florida, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in this proceeding on February 6, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 893 F.2d 1189, and is reprinted in Appendix at 1a. The memorandum decision of the United States District Court for the Northern District of Florida

(Paul, Maurice M.) has not been reported, and is reprinted in the Appendix at 36a.

JURISDICTION

The Court of Appeals for the Eleventh Circuit entered judgment on February 6, 1990, and reversed the judgment of the United States District Court for the Northern District of Florida, entered August 11, 1986. The Court of Appeals denied a petition for rehearing on April 2, 1990, which was timely made under 11th Cir. R. 35-6. Petitioners invoke jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

- 28 U.S.C. § 1254(1)
[Reprinted in Appendix at 81a]
- 28 U.S.C. § 1291. Final decisions of district courts
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- 28 U.S.C. § 1331. Federal question
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[Reprinted in Appendix at 96a]

STATEMENT OF THE CASE

The District Court Case:

Respondents invoked jurisdiction of the federal district court under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., under 42 U.S.C. §§ 1981, 1983; and under 28 U.S.C § 1331.¹ Applicants filed this employment discrimination action on June 19, 1979, which alleged that Florida engaged in a pattern of racial discrimination. [R1-1; App. 36a] The cause came to trial during April of 1986 and lasted fifteen days. At trial eleven individuals presented over sixty claims, which were predominantly promotional claims. [App. 41a-80a]

The trial court discounted testimony of Applicants' expert, found Florida's expert credible, and determined that Applicants did not bear their burden to prove racial disparity in hiring or promotion. [App. 15a; 36a-38a]

¹ Here Respondents will be referred to as "Applicants"; Petitioners, the Secretary of State for the State of Florida and the State of Florida will be referred to as "Florida". "App." denotes Appendix; "R" denotes Record.

Further, the trial court criticized Applicants' presentation of proof and decried their general lack of information concerning "what job was applied for, when, and who received it." [App. 39a]

Florida asserted that it based its employment decisions on candidates' qualifications. Florida presented a large volume of evidence which supported its contention. The trial court suggested that Florida did not have to present such a quantity of evidence in support of its legitimate reason but that since it did, Florida had more than sufficiently met its burden of production. [App. 41a]

Florida's case involved six days of testimony by supervisors of Applicants and State of Florida officials. [App. 25a] Because this was predominantly a promotional claims case, Florida was able to introduce a substantial quantity of documentary evidence which set forth Applicants' prior employment performance and their credentials. [App. 25a; 44a-80a] These documents included personnel files, work history, performance evaluations, and job applications. [App. 44a-80a] In addition, Florida introduced the selectees' employment applications, and the written qualifications for each targeted position. *Id.* and [e.g., R. 31, T. 53] Florida asserted that certain Applicants were not promoted because, for example, their records revealed:

. . . dismissal for physically striking a supervisor; failure to take a qualifying exam at the suggestion of the supervisor; a history of conditional and unsatisfactory evaluations by both black and white supervisors; a poor attendance record; rudeness to customers; excessive errors; disruptive and loud behavior; failure to listen to criticism; lack of motivation and initiative;

attendance of an unaccredited college; and misrepresentation of educational qualifications on an employment application.

[App. 26a]

Further, Florida presented evidence which contradicted some Applicants' claims that they applied for "available" positions. [App. 42a] In most instances, Florida's evidence revealed that the selectee had more tenure on the job, experience in a specific area, or higher educational credentials than did Applicant. [App. 44a-80a]

The trial court assumed without deciding that Applicants established a *prima facie* case and ruled that Florida had more than sufficiently met its burden of production. The trial court ruled that Applicants at all times carried the burden of persuasion. [App. 36a-40a] The court held that Applicants failed to show by a preponderance of evidence that they had superior qualifications, or to demonstrate through anecdote or statistics that Florida's asserted reason was a pretext for actual discriminatory practices. [App. 42a; 43a-80a]

The Case in the Eleventh Circuit:

Applicants invoked jurisdiction below under 28 U.S.C. § 1291. The Eleventh Circuit reviewed five issues on appeal. [App. 8a] The first issue, "Did the defendants properly articulate a legitimate non-discriminatory reason for the employment decisions when the trial court assumed that a *prima facie* case had been made out by the plaintiffs?", is the critical issue here. *Id.*

The Eleventh Circuit reasoned that because Florida did not offer proof by any person who made the actual

employment decision, that Florida's extensive testimonial and documentary evidence did not constitute an "articulation" of a nondiscriminatory reason. [App. 11a-12a] The Eleventh Circuit determined Applicants did not have sufficient opportunity to establish pretext, absent the actual decisionmakers' presence in court, and reversed the trial court judgment.

Circuit Judge Edmondson, in his dissent, stated that adequate evidence supported the trial court's findings, and that the majority failed to apply the clearly erroneous standard. [App. 22a-23a] Further, the dissent recognized that Florida presented a significant quantity of evidence supporting its employment actions – notwithstanding the opinion of the trial court that Florida was not required to supply such a quantity of evidence. [App. 20a-30a] The dissent noted that because Florida did produce evidence in response to each claim in support of its position that it chose the most qualified, "no mystery cloaked [Florida's] position about why [Applicants] were not promoted". [App. 25a].

WHY THE WRIT SHOULD BE GRANTED

POINT 1

Under *McDonnell Douglas-Burdine* standards, may a federal court of appeals conduct review following trial and reverse judgment in favor of employer which produced testimonial and documentary evidence to support its contention that it hired the most qualified, because the actual decisionmakers did not testify?

Introduction:

The Eleventh Circuit committed error in reversing the district court's judgment just because Florida did not

produce a witness who could testify for each employment decision that, "I promoted ___, who I believed to be the most qualified person because" [App. 27a] In an untoward manner the decision prescribes exactly what evidence an employer – such as the State of Florida – must produce when faced with employment discrimination claims, where the employer's articulated reason invokes policy to choose the most qualified. See *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) and *McDonnell Douglas v. Green*, 411 U.S. 792 (1973).

Under the holding below, the employer would be unable to establish a defense where the actual decision-maker is unavailable or unable to testify. The burden of production to articulate a non-discriminatory reason for an employment decision under *McDonnell Douglas-Burdine* standards has never been so narrowly or specifically construed, nor should it be. Certiorari should be granted here for plenary review or in the alternative granted to vacate and reverse or remand.

The Error Below:

At trial Florida introduced testimony that Florida chose the most qualified candidates for promotion. Florida supported its contention with documentary and testimonial evidence about the relative qualifications of Applicants and of those selected for each identified position. [App. 25a] Because the actual decisionmaker did not testify, however, the Eleventh Circuit determined that Florida's quantity of evidence was insufficient to meet its burden to frame the legitimate reason issue for Applicants.

The Eleventh Circuit is wrong. Florida provided Applicants with ample notice of its reasons for its employment decisions. The actual decisionmaker does not need to testify in order to frame the issue to provide fair opportunity to establish pretext. The Eleventh Circuit is wrong because its decision confines the employer to the use of a certain type of direct testimonial evidence to satisfy its intermediate burden, in conflict with the Federal Rules of Evidence and the precedent cases. *See, e.g., Fed.R.Evid. 301, 1001-1005; and Burdine, supra; McDonnell Douglas, supra.*

Under the precedent cases, the employer maintains the burden to come forward with *admissible evidence* – not a certain type of evidence – in order to frame the reason issue. Federal Rule of Evidence 301 permits a presumption to be overcome through the introduction of “evidence”, period. Evidence under the Rules may be documentary and/or testimonial, direct and/or circumstantial. Prior to the decision below the Federal Rules of Evidence applied in their entirety to a discrimination case.

Florida unequivocally advised Applicants that it relied on qualifications in making employment decisions. [App. 25a] Applicants were provided ample opportunity to establish pretext by a) showing that they were more qualified than the selectees, or b) presenting anecdotal or statistical evidence showing that more likely than not the “superior qualifications” reason was pretext for an actual discriminatory motive. [App. 40a-43a] This they failed to do.

The Eleventh Circuit by its error has created an impossible situation for both Florida and other employers faced in the future with discrimination claims, under circumstances where the actual decisionmakers are unavailable, unable, or unwilling to testify.

The Conflict.

Certiorari should be granted here because the Eleventh Circuit's decision conflicts with the precedent decision of this Court in *Burdine*, 450 U.S. 248. *Burdine* held that defendant must rebut the prima facie presumption of discrimination by introducing admissible evidence that plaintiff was rejected for a legitimate, nondiscriminatory reason. *Id.* at 254. See also *McDonnell Douglas*, 411 U.S. at 802-803. Neither *Burdine* nor *McDonnell Douglas* require a specific type of evidence to satisfy employer's burden.

The Eleventh Circuit's decision conflicts directly with the *Burdine* burden standards and with the principles established in that case upon which those standards are based. See generally *United States v. National Bank of Commerce*, 472 U.S. 713 (1985) (certiorari granted based on appearance of direct or principle conflict); *Oregon Department of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985) (certiorari granted based on conflict in principle). *Burdine* holds that the sufficiency of employer's evidence should be evaluated only in terms of whether a legitimate reason has been presented and whether plaintiff has "full and fair" opportunity to establish pretext. *Id.* at 255-56. The Eleventh Circuit, however, has determined that employer's evidence should be evaluated in terms of

whether it includes a certain type of direct, testimonial evidence.

The Eleventh Circuit's decision here also conflicts with other Courts of Appeals. The Fifth Circuit has decided in *Bernard v. Gulf Oil Corp.*, 890 F.2d 735 (5th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3744 (U.S. April 17, 1990) (No. 89-1617) that it is permissible for employer to present its legitimate reason through argument of counsel, as long as it is related to some record facts. *Bernard* conflicts in principle with the Eleventh Circuit here in that it broadens rather than narrows what would constitute an adequate employer's production. *Bernard* is pending before this Court.

The decision in *Mills v. Ford Motor Company*, 800 F.2d 635, 639 (6th Cir. 1986), – involving a discriminatory discharge claim – conflicts with the decision here. The *Mills* court held that documentary evidence in the form of employment performance evaluations was sufficient to establish employer's articulation. The court ruled that employer's failure to call Mills' actual supervisors to testify was simply an additional evidentiary factor "to be considered in evaluating whether the non-discriminatory reason was pretext". *Id.* at 639

Further, the *Mills* court held that failure to produce the decisionmakers' testimony had "no bearing" on the district court's acceptance of employer's articulated non-discriminatory reason for its employment decision. *Id.* at 639. According to the court, Mills was able to establish pretext by a narrow margin through testimony which contradicted the employment documents, because supervisors did not come forward to explain these documents.

Id. at 640. The Eleventh Circuit, in conflict, found that failure to present decisionmakers' testimony would constitute a failure to rebut an initial inference of discrimination. In this case Applicants presented no evidence to refute what the employment documents revealed.

Likewise, *McDonald v. United Airlines, Inc.*, 745 F.2d 1081, 1087 (7th Cir. 1984), *cert denied*, 471 U.S. 1065 (1985) – a gender discrimination case evaluated under *Burdine* standards – produces conflict with the decision here. The *McDonald* court stated that employer must come forward with “admissible evidence and not merely an answer to the complaint or argument of counsel.” The *McDonald* court suggested that employer could produce, e.g., extrinsic evidence of plaintiff's employment history, or impeach plaintiff on cross-examination, to rebut plaintiff's *prima facie* case. *Id.* at 1088. The *McDonald* court held that where *admissible evidence is not available in any form*, then the trier of fact should conclude that the defendant has failed to meet its burden. The Eleventh Circuit here held that even where evidence is produced, if the decisionmaker is not available the plaintiff must prevail.

Mitchell v. Baldrige, 759 F.2d 80 (D.C. Cir. 1985) – which involved superior qualifications and Rule 41(b) dismissal issues – also conflicts with the Eleventh Circuit's decision here. The *Mitchell* court suggested that a successful “articulation” could occur where the employer's counsel directs plaintiff's attention to the superior qualifications of the selected candidate during plaintiff's case in chief. The court held that it was not sufficient for the trial court to first address the subject after plaintiff rested. *Id.* at 83. The court stated:

. . . if evidence of selectees' superior qualifications had been presented by defendant during plaintiff's case-in-chief, and plaintiff had been given a full and fair opportunity to rebut, the district court could have rested a Rule 41(b) dismissal on a finding that the employer's decisions simply reflected the superior qualifications of the selectees, and not discriminatory motives.

Id. at 88-89. In this case, however, the Eleventh Circuit decided that even after full trial it was not sufficient notice to Applicants for Florida's witnesses to discuss the candidates' qualifications, and to point out that the employment documents demonstrated that the selectees were better qualified than were Applicants.

Finally, the Eighth Circuit in *Gray v. University of Arkansas*, 883 F.2d 1394, 1401 (8th Cir. 1989), and the Sixth Circuit in *Tye v. Board of Education of the Polaris Joint Voc. School Dist.*, 811 F.2d 315, 317-319 (6th Cir. 1987), *cert denied* 484 U.S. 924 (1987), held that employer may articulate even untrue reasons as long as plaintiff is provided with opportunity to show that the proffered explanation is pretext for actual discrimination. The *Tye* court held that employer's intermediate burden would be satisfied through the introduction of even a "reconstructed document" listing ten admittedly *untrue* reasons for the employment decision. *Tye* at 318-319, n. 2. *Gray* held that the only relevant inquiry was whether the decision was based on an illegal motive. *Gray* at 1401.

The Importance of the Decision:

The State of Florida along with other public employers are at risk for experiencing employment

discrimination suits by virtue of the fact that those employers maintain extensive personnel needs and must make frequent hiring and promotional decisions – thereby disappointing numerous candidates.² In addition, disgruntled employees often consider such employers a proverbial “deep pocket”. Due to keen competition from the more lucrative private sector, public employers also experience frequent staff turnover and a loss of contact with former employees. When those employers are faced with discrimination claims, they will often be unable to produce the actual decisionmaker to testify concerning his or her employment decision. Under the decision here, those unfortunate employers would be unable to establish a defense even though the targeted decision occurred on legitimate grounds.

What the Eleventh Circuit fails to accept is the fact that a major employer, such as the State of Florida, does maintain a well-established personnel system encompassing a clearly defined comprehensive record-keeping structure and clearly defined hiring and promotional practices guidelines. Florida, like most employers, bases its employment decisions on a determination of which candidate is the most qualified for an available position. See, e.g., *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358 n. 44 (1977) (absence or relative lack of qualifications is one of the two most common legitimate reasons upon which an employer might rely

² The State of Florida, according to the personnel office of the Division of Administration, employs approximately 148,744 individuals under its various departments. The Department of State, targeted in this case, has 732 employees.

for its decisions). In those situations where the employer is sued and the actual decisionmaker is unavailable, unable, or unwilling to testify, employment records would be readily available at trial to precisely frame the reason issue for plaintiffs. This is particularly true in cases, such as here, where the claims revolve around a promotional decision. Under those circumstances the employer would have extensive documentation available which accurately reflects plaintiffs' employment history. The plaintiffs would have due notice and ample opportunity to persuade the trier of fact that the reason offered is pretextual.

The Eleventh Circuit has placed an intolerable burden on the employer by holding that employment documents and the testimony of other knowledgeable witnesses cannot constitute evidence of a legitimate reason, absent the testimony of the actual decisionmaker. The applicant prevails if the decisionmaker does not testify.

POINT 2

After a discrimination case is fully tried on the merits, may a federal court of appeals reverse based on its decision that employer's intermediate stage evidence was inadequate without proceeding directly to determine whether the record supports the trial court's finding on the ultimate issue of discrimination?

Introduction:

Certiorari should be granted here because the Eleventh Circuit reviewed Florida's "articulation" evidence apart from any other evidence and reversed the trial

court's judgment without determining whether the record in its entirety supported the finding that intentional discrimination did not exist.

The Error Below:

The Eleventh Circuit failed to follow established standards for appellate review because the court did not proceed directly to determine whether or not the trial court was clearly erroneous in its finding on the discrimination issue.

The analysis performed by the Eleventh Circuit was wrong. A discrimination case should not be removed from the realm of other types of cases which are subject to appellate review. *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 575 (1985), citing *McDonnell Douglas* (burden of production sequence does not create special rules of civil procedure for discrimination cases); and *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715-16 (1983) (once case fully tried a rigid *McDonnell Douglas - Burdine* analysis should not be pursued).

Federal Rule of Civil Procedure 52(a) in pertinent part reads:

. . . Findings of fact, whether based on *oral or documentary evidence*, shall not be set aside unless clearly erroneous, . . . [emphasis supplied].

The trial court in this case entered *forty-nine pages of findings and conclusions*. [App. 43a-80a] By way of example regarding Applicant Rosa Henderson, the trial court stated:

Plaintiff contends that her attitude was not bad, that she was given these low evaluations without justification because of her race. Rosa Henderson's bad attitude was apparent even in the Court room during trial. The Court finds that these evaluations were not motivated by race and were properly considered when plaintiff Henderson applied for other positions.

[App. 72a] Based upon the evidence both parties presented, the trial court here determined that Florida clearly articulated a non-discriminatory reason, that Applicants failed to carry their burden of persuasion on the ultimate issue, and that, therefore, intentional discrimination did not exist. The Eleventh Circuit reversed.

The Eleventh Circuit is wrong because it based its reversal on its decision that Florida did not produce a successful "articulation". As Judge Edmondson explained in his dissent, the court erred because it failed to review this case of alleged discrimination "as any other trial in which the district court sits as factfinder" and failed to "proceed directly to the ultimate question of intentional discrimination;" citing *Bazemore v. Friday*, 478 U.S. 385, 398 (1986) (Brennan J., concurring in part). [App. 21a-22a]

The Conflict:

After a case is fully tried on the merits – as it was here – the appellate court's task upon review is to determine whether the trial court was clearly erroneous in its finding on the intentional discrimination issue. *Bazemore*, 478 U.S. at 398.

The Eleventh Circuit performed its review in a manner which conflicts with the task allotted to the appellate court in *Gray*, 883 F.2d at 1402. The *Gray* court stated:

Our task on appeal is not . . . to determine whether the evidence offered at each sequence of the McDonnell Douglas analysis was adequate. Rather, after the district court has decided the ultimate question of discrimination *vel non*, we determine whether the record supports the court's finding that [the defendant] did not dismiss [plaintiff] because of her sex. [Emphasis supplied.]

Id. at 1402; citing, *Aikens*, *supra*; *MacDissi v. Valmont Industries, Inc.*, 856 F.2d 1054, 1059-60 (8th Cir. 1988); *Crutchfield v. Maverick Tube Corp.*, 854 F.2d 307, 309 (8th Cir. 1988). The *Gray* court held that if there is no objective documentary evidence to contradict employer's evidence and if employer's evidence is "internally consistent and plausible on its face", such that a "reasonable factfinder" would credit it, the reviewing court must affirm the trial court's judgment as not clearly erroneous.

In conflict, the Eleventh Circuit focused the analysis on whether Florida's evidence was adequate, rather than on the record in its entirety and whether it supported the finding on the ultimate issue. In *Ottaviani v. State University of New York at New Paltz*, 875 F.2d 365, 374 (2d Cir. 1989), *cert denied*, 110 S.Ct. 721 (1990) the court stated recent precedent has made it clear the appellate court may not reverse a finding that plaintiffs "failed to preponderate" on their claim unless it is clearly erroneous in light of all the record evidence or rests on legal error.

Likewise, in *Comeaux v. Uniroyal Chemical Corp.*, 849 F.2d 191, 193 (5th Cir. 1988) the court held that when a Title VII disparate treatment case has been fully tried on the merits, "appellate review appropriately focuses on whether plaintiff met its burden of proof as to discriminatory intent." Finally, in *Doe v. First National Bank of Chicago*, 865 F.2d 846, 874 (7th Cir. 1989), the court stated:

If the district court's account of the evidence is plausible in light of *the record viewed in its entirety*, the court of appeals may not reverse it even though convinced that had it been sitting as trier of fact, it would have weighed the evidence differently. [Emphasis supplied].

The Eleventh Circuit decision is in conflict with both *Comeaux* and *Doe*.

The Importance of the Decision:

If a court of appeals re-weighs and re-examines the nature of employer's evidence at the intermediate stage – as it did here – without consideration of the evidence in its entirety vis-à-vis the plaintiff's ultimate burden of persuasion, a separate standard of review would be established in the discrimination arena. This separate standard would allow the appellate court to sit as fact-finder and would render discrimination cases far more susceptible to reversal. Litigants and the federal courts would be subjected to unnecessary expenditure of both time and financial resources.



CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to the Eleventh Circuit should be granted and the case subjected to plenary review or in the alternative granted to vacate and reverse or remand.

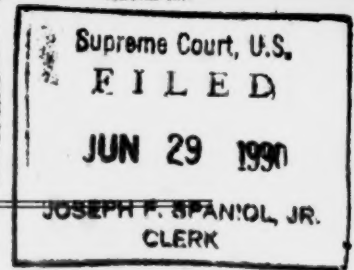
Respectfully submitted,

RICHARD M. DUNN
Counsel of Record

BARBARA A. EAGAN
DUNN, DRESNICK & LODISH, P.A.
2400 One Biscayne Tower
2 South Biscayne Boulevard
Miami, Florida 33131
(305) 374-4401

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**APPENDIX
TO PETITION FOR WRIT OF CERTIORARI
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RICHARD M. DUNN
Counsel of Record

BARBARA A. EAGAN
DUNN, DRESNICK & LODISH, P.A.
2400 One Biscayne Tower
2 South Biscayne Boulevard
Miami, Florida 33131
(305) 374-4401

Attorneys for Petitioner

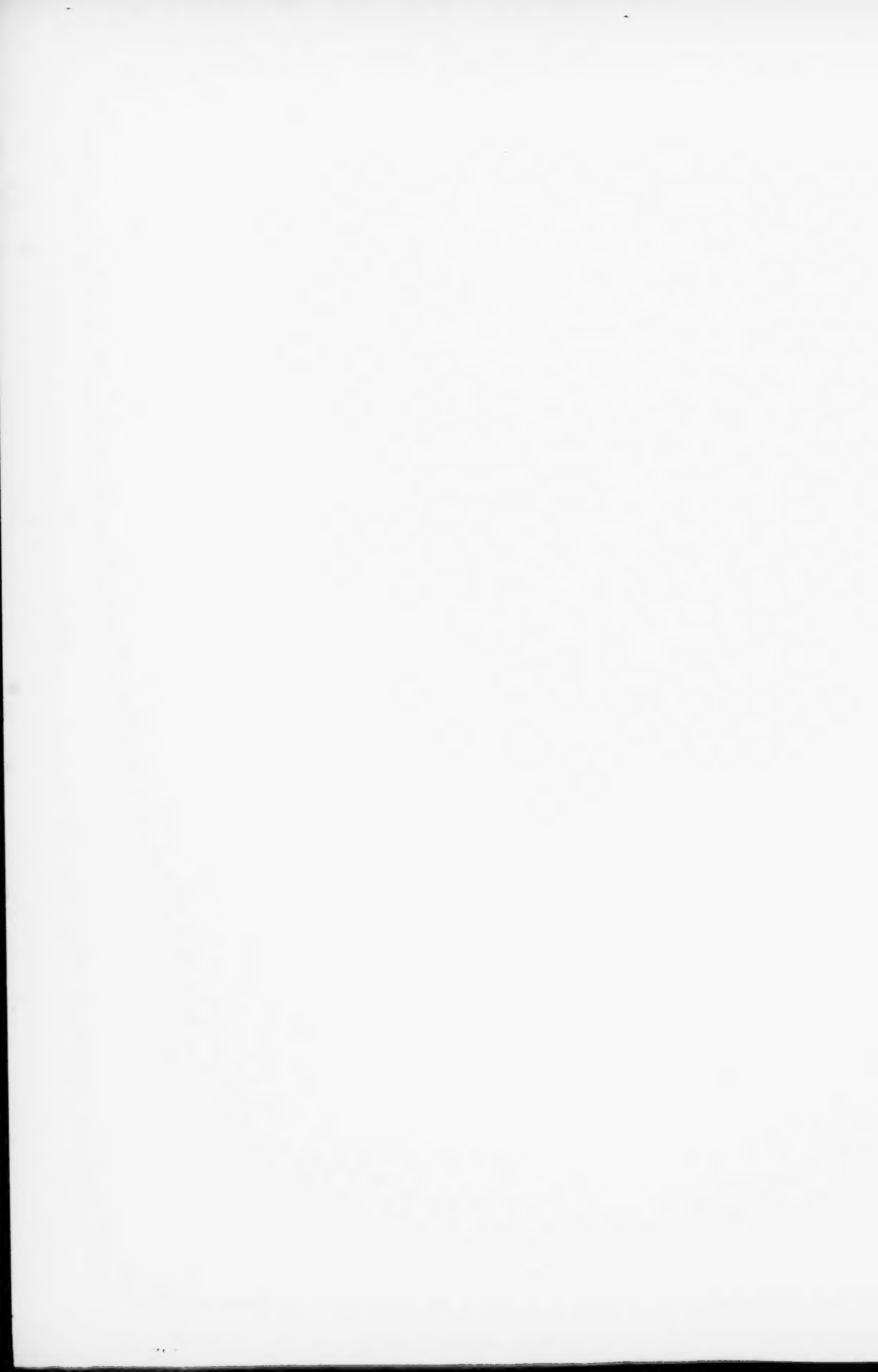


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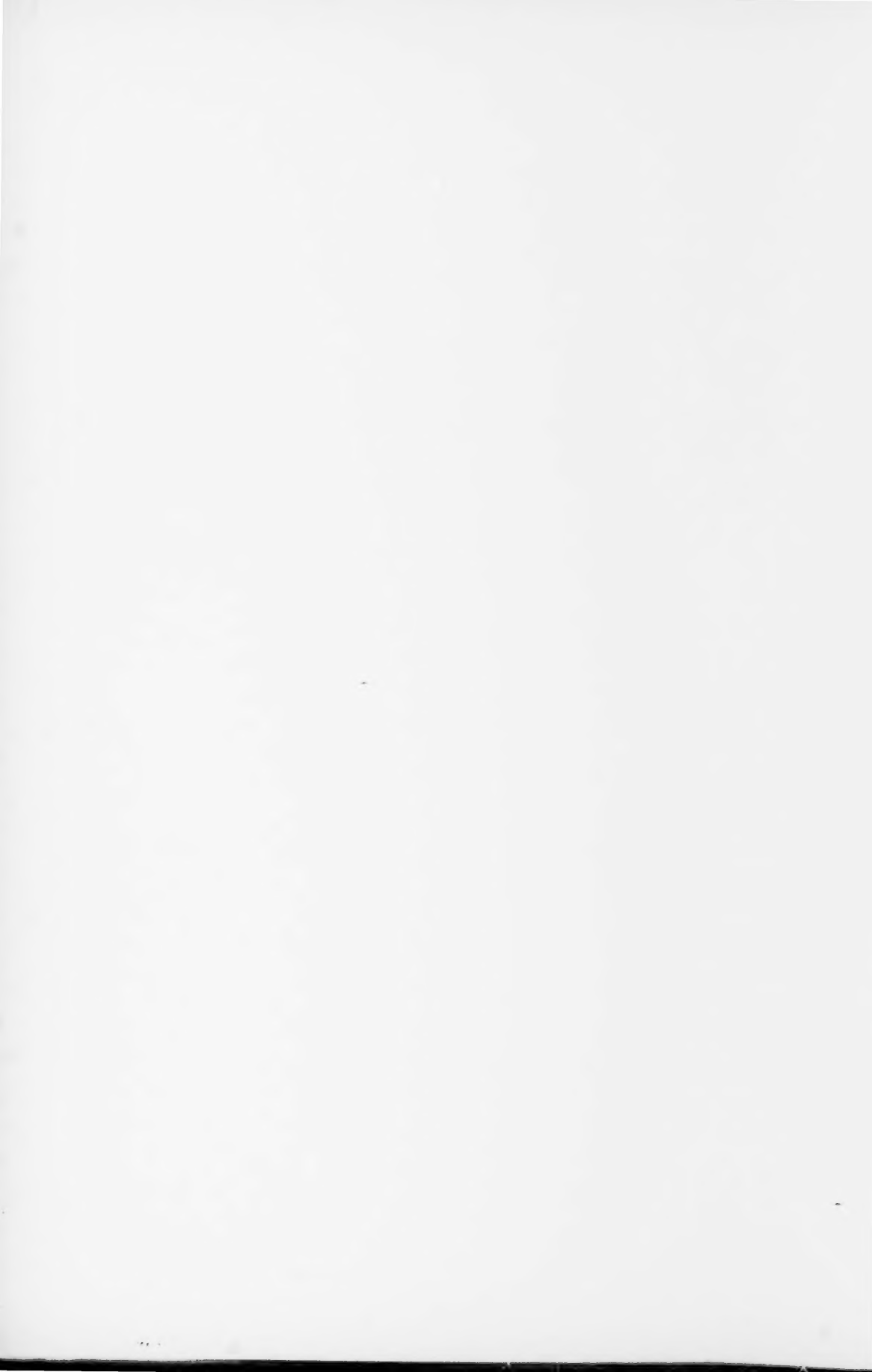
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INCREASE MINORITY PARTICIPATION BY
AFFIRMATIVE CHANGE TODAY OF
NORTHWEST FLORIDA, INC. (IMPACT), on
behalf of itself and its members, Diann
Walker, Louvenia Jones, Pearlie Williams, Gra-
cie Holton, Rosa Henderson, Delores Colston,
Charles Stewart, Barbara King, Dorothy
Roberts, Plaintiffs-Appellants,

Jacqueline Ross, Linda Issac,
Intervenors-Appellants,

and

Clifford Simmons, Marguerite
Stewart, Plaintiffs,

v.

George FIRESTONE, as Secretary of
the State of Florida, State of
Florida, Defendants-Appellees.

INCREASE MINORITY PARTICIPATION BY
AFFIRMATIVE CHANGE TODAY OF
NORTHWEST FLORIDA, INC. (IMPACT), on
behalf of itself and its members, Diann
Walker, Louvenia Jones, Pearlie Williams, Gra-
cie Holton, Rosa Henderson, Delores Colston,
Charles Stewart, Barbara King, and Dorothy
Roberts, on behalf of themselves and all others
similarly situated, Plaintiffs-Appellants,

Clifford Simmons and Marguerite
Stewart, Plaintiffs,

Jacqueline Ross and Linda Issac,
Intervenors-Appellants,

v.

George FIRESTONE, as Secretary of
State of the State of Florida, and State
of Florida, Defendants-Appellees.

Nos. 86-3623, 86-3727.

United States Court of Appeals,
Eleventh Circuit.

Feb. 6, 1990.

Organization and certain of its members filed civil rights action against the state of Florida, alleging racially discriminatory practices in the hiring and promotion of black persons by the state and its officials. The United States District Court for the Northern District of Florida, No. TCA 79-895-11, Maurice Mitchell Paul, J., decided all claims against plaintiffs, and they appealed. The Court of Appeals, Tuttle, Senior Circuit Judge, held that: (1) defendants did not meet their burden of production in regard to articulation of legitimate nondiscriminatory reasons for employment decisions; (2) court did not abuse its discretion in rejecting testimony of plaintiffs' expert on ground that he was a political scientist, not a statistician or economist; and (3) plaintiffs had standing to raise issue of discriminatory nature of employment examination.

Reversed and remanded.

Edmondson, Circuit Judge, filed opinion concurring in part and dissenting in part.

Appeals from the United States District Court for the Northern District of Florida.

Before JOHNSON and EDMONDSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

TUTTLE, Senior Circuit Judge:

This is an appeal by the plaintiffs and intervenors from a judgment in a non-jury civil rights action in which

the trial court decided all claims against the plaintiffs and intervenors.

I. STATEMENT OF THE CASE

Plaintiff Increase Minority Participation by Affirmative Change Today of Northwest Florida, Inc. (IMPACT) on behalf of its members named in the title (*supra*), Clifford Simmons, and Marguerite Stewart, filed this civil rights action in 1979 against George Firestone as Secretary of State of the State of Florida and against the State itself, seeking injunctive and monetary relief from the alleged racially discriminatory practices of the defendants in hiring and promotions of black persons by the State and its officials.

The action was originally filed as a class action, was certified as such, and continued as such for approximately five years when the trial court decertified the class action, stating as a ground for doing so, that the record disclosed insufficient financing available to permit counsel properly to represent the class.¹

¹ The trial court based this decision on counsel's statement supporting a motion by plaintiffs to order prompt compliance with plaintiffs' interrogatories that had been pending for months at that time. Counsel stated that the cost of the litigation would amount to something between \$30,000 and \$50,000, whereas a court order requiring immediate compliance would save substantial amounts. The court referred to the \$30,000 to \$50,000 cost as the basis for decertifying the class, although counsel at that time stated that the finances supporting the claim had been substantially improved.

Subsequently, the trial court dismissed the plaintiffs' motion to require discovery of the examinations and tests and test scores of the plaintiff applicants and those of the successful employees. The plaintiffs later filed a motion to recertify the class which the court, after a hearing, denied. At the same time, it dismissed the organizational plaintiff, IMPACT, as a party to the litigation. The court held that IMPACT had no separate interest apart from that of the individual plaintiffs, and therefore, did not have standing.

The case was set for trial for March 28, 1986. On March 7, plaintiffs filed an emergency motion requesting the court to expedite its disposition of the pending motions requiring information regarding the employment examinations and other employment information. On March 26, the court held that employment tests were not an issue in the litigation but required that answers to some of the interrogatories be furnished.² This motion

² The interrogatories which the court required to be answered asked for the following information:

- a. Full name
- b. Social security number
- c. Address
- d. Telephone number
- e. Race
- f. Sex
- g. Positions applied for, or certified for
- h. Date of each eligibility

(Continued on following page)

had been pending before the court for two years. The case went to trial on April 1.

Following the plaintiffs' case-in-chief, the court dismissed all disparate impact claims and dismissed the individual claims of Gracie Holton. The court issued its opinion styled "Findings of Fact and Conclusions of Law and Final Judgment" on August 11, 1986. In its memorandum, the court decided all claims against the plaintiffs and intervenors.

Much of the plaintiffs' proof was developed from the personnel records maintained by the defendants. The trial court did not decide whether, in any of the cases, the plaintiffs made out a prima facie case. However, the court proceeded to consider the defendants' *explanation* on the assumption that prima facie cases had been made out on all of the plaintiffs' claims.

The trial court stated:

In this case the defendant *contends* that the person believed to be most qualified was hired unless friendship or political connections played some role. In every instance the defendant *denies* that race affected the decision. Making that statement satisfied the defendants' light burden [under *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)].

(Continued from previous page)

The court ordered: "Defendants are directed to provide plaintiffs with the register information concerning individuals who applied for positions with the Department of State or [in?] Leon County from 1972 to date."

II. SUMMARY OF FACTS

Without attempting to determine from the testimony and records introduced during the 11 day trial whether every plaintiff or intervenor made out a prima facie case, it is perfectly clear that all of the intervenors, proved that they were black employees, they had made applications for the specified positions, that the positions had been filled by another person, and that, in most if not all cases, that other person was white. Moreover, the proof adequately showed that each of the applicants was qualified for the position sought.³ In each case, also, the position remained open after the plaintiff had been denied the appointment. In some of the personnel records introduced by the plaintiffs or the defendants, it is clear that with respect to either education, prior experience, or training, the applicant was superior to that of the successful applicant. It is also clear from some of the personnel records that the white applicant was superior on one or more of the same "qualifications." With respect to others, the plaintiffs offered no proof as to the relative qualifications of the successful applicant.

The defendants' principal personnel official, who was first employed by the defendant in 1984, after the case had been pending nearly five years, testified that it was the general practice of the defendant to hire the "most qualified" applicant. There was no testimony as to what the defendants considered as a "qualification." Nor

³ The personnel director for the defendants gave evidence that the only persons considered by the "selector" of the successful applicant were those who had already been determined to be qualified for the post.

was there even any testimony by any person who made the employment decision that the particular selectee was chosen as better qualified.

The plaintiff tendered its expert witness, Dr. Dyson, for the purpose of analyzing the evidence of employment actions by the defendants. His testimony, if it had been accepted by the trial court, was clearly sufficient to establish a statistical disparity between the employment actions taken in favor of black applicants as against those taken in favor of whites. However, the defendant also produced an expert witness who used a different benchmark and database than those used by plaintiffs' expert and the court determined that Dr. Dyson "was qualified to make the mathematical calculations he performed. However, Dr. Dyson is a political scientist, not a statistician or economist, and he testified about matters beyond his expertise." The court rejected Dr. Dyson's testimony in favor of that of the defendants' expert and rejected his statistical evidence.

The Assistant Secretary of State, testifying for the defendants, gave evidence that the final selection of each employee was intended to be, and actually was, subjective.⁴ There was ample evidence in the record that the

⁴ On cross-examination, he was asked the question:

Q: Basically, the decision to hire after you get past the T and E process is a subjective one?

A: There is no doubt about that. Wherever individuals are involved, you have subjectivity.

(Continued on following page)

overwhelming proportion of the persons making the hiring decision were white persons.

III. ISSUES ON APPEAL

- (1) Did the defendants properly articulate "a legitimate non-discriminatory reason" for the employment decisions when the trial court assumed that a prima facie case had been made out by the plaintiffs?
- (2) Whether the trial court erred in not making a specific finding that a prima facie case had been made out, based on the expert testimony offered by plaintiffs.
- (3) Whether the trial court erred in not recertifying the case as a class action.
- (4) Did the trial court err in eliminating the employment examination issue?
- (5) Did the court improperly dismiss the claims of plaintiff Holton?

These are the only claims we think merit attention on appeal.

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Q: And there is no real check on what the hiring people do except T and E?

A: In general, that's true.

The term "T and E" used in this quote refers to the original qualification for employment or promotion. All applicants must have satisfied the T and E before they could be considered.

IV. DISCUSSION

A. *Defendants' Burden of Production*

1. Underlying the entire judgment of the trial court is plaintiffs' contention that the trial court, once it assumed that prima facie cases had been made out by the plaintiffs and intervenors, erred in failing to require the defendants adequately to "articulate some legitimate, non-discriminatory reason" for its employment actions. The Supreme Court in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), carefully described the burden that shifts to the defendant once a prima facie case is made out. The Court there said:

The burden that shifts to the defendant therefore is to rebut the presumption of discrimination *by producing evidence* that the plaintiff was rejected, or someone else was preferred, for a legitimate non-discriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient *if the defendant's evidence* raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this the defendant *must clearly set forth through the introduction of admissible evidence the reasons* for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant.

450 U.S. 248, 257, 101 S.Ct. 1089, 1095 (emphasis added).

As pointed out above, the trial court here held that the defendants had satisfied the requirement under *Burdine* merely by *contending* that the person believed to be most qualified was hired and because the defendants

denied that race affected the decision. The Court said: "Making that statement satisfied the defendants' light burden."

Appellees contend here that the trial court's standard of articulation is somehow supported by this Court's decision in *Perryman v. Johnson Products Co., Inc.*, 698 F.2d 1138 (11th Cir.1983). In that case, we stated that after a *prima facie* case had been made by the plaintiff:

. . . the defendants' burden of rebuttal is exceedingly light; 'the defendant need not persuade the court that it was actually motivated by the proffered reasons. . . . It is sufficient if the defendants' evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff.' [*Burdine*] [450 U.S.] at 254-55 [101 S.Ct. at 1094-95]. . . . At this stage of the inquiry, the defendant need not persuade the court that its proffered reasons are legitimate.

Based on this statement, appellees seem to be urging that in *Perryman*, we, in some way, lightened the burden of articulation as carefully mandated in *Burdine*. Of course, this is far from the truth. The statement that the burden was exceedingly light referred to the following part of the quotation which pointed out that there was no burden on the defendant to actually "prove" its reason. We did not mean, and of course we could not have meant, to hold that the burden of articulation was any less than that provided by the Supreme Court in *Burdine*. Therefore, the continued reference by the trial court to the "light," or "exceedingly light" burden on the defendants has no place in our consideration of this issue. The burden, of course, is precisely as stated in the above quotation from *Burdine*.

Appellees, by their brief here, attempt to support the trial court's statements by saying: "in other words, in order to satisfy this intermediate burden, the employer need only produce admissible evidence *which would allow* the trier of fact to rationally conclude that the employment decision was not racially motivated." Appellees' Br. p. 7 (emphasis added). In other words, appellees contend it is sufficient if they introduced evidence showing dissimilarities in two applicants' records so that the court could then decide which was better qualified.

It is clear, therefore, that the trial court adopted an incorrect standard by which to weigh the purported reasons given for the employment actions.

2. Furthermore, it is clear that the trial court erred in determining that in each of the more than 60 claims with which it dealt and as to which it assumed the establishment of a *prima facie* case, the defendants had satisfied the requirements of *Burdine*. In not a single case, did the defendants offer proof by any person who made the employment decision, or by any other person, stating that the decision was made on the basis of what he or she thought demonstrated the best qualified person. Moreover, the statement by the personnel director, Kassees, that it was the *general practice* of the department to select the best qualified, would not satisfy the requirements. He, of course, could not testify as to the basis of selection of the many selectees before he was employed in 1984. Moreover, each applicant is entitled to have his or her individual claim considered separately, not as one "in general." Moreover, the mere statement that the State selected the "best qualified" would be insufficient to

satisfy the *Burdine* requirements. Qualifications for selection of an employee can depend upon seniority, length of service in the same position, personal characteristics, general education, technical training, experience in comparable work or any combination of them. A mere statement that the employer hired the best qualified person leaves no opportunity for the employee to rebut the given reason as a pretext, which the employee must do if a proper reason is articulated.

The Supreme Court made perfectly clear in *Burdine* the reason for requiring the introduction of admissible evidence of the actual reason for the action taken. The Court stated:

Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to *frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext. The sufficiency of the defendant's evidence should be evaluated by the extent to which it fulfills these functions.*

450 U.S. at 255, 101 S.Ct. at 1094 (emphasis added). This, of course, means that the plaintiff must be given a fair opportunity to cross-examine the defendant's witnesses as to the actual reason which is testified to.

As pointed out above, the record does disclose that at least in some of the claims of some of the intervenors, the black applicant either had more seniority, more general education, or more experience on the particular job than the person who was given the position, but such claimant was not given the opportunity to rebut the claim of the State that the selectee was better "qualified" because no

witness testified to the particular qualification that was used by defendants.

This Court has expressly held that under *Burdine*, there must be "evidence that asserted reasons for discharge were actually relied on" or "the reasons are not sufficient to meet defendants' rebuttal burden." *Lee v. Russell County Board of Education*, 684 F.2d 769, 775 (11th Cir.1982), citing *Tanner v. McCall*, 625 F.2d 1183, 1195 n. 21 (5th Cir.1980), *cert. denied*, 451 U.S. 907, 101 S.Ct. 1975, 68 L.Ed.2d 295 (1981), and see *Uviedo v. Steves Sash & Door Co.*, 738 F.2d 1425, 1429 (5th Cir.1984). There, the Court stated:

Appellant next argues that the record is replete with non-discriminatory reasons for [its employment actions]. . . . The difficulty there, however, is that the defendant never articulated to the magistrate that these *were in fact* the reasons for the particular challenged actions.

(Emphasis in original).

In this case, the defendants offered no evidence explaining any employment decision. The Court spoke in terms of the defendants' "claim" that all employees were selected on the basis of qualifications. Such a "claim," not supported by admissible evidence, did no more than allow defendants to furnish a resume from which the trial court then made *its* determination that the person selected was better qualified than the black applicant. Introducing personnel records which *may* have indicated that the employer based its decisions on one or more of the possible valid grounds did not suffice.

We must, therefore, remand the case to the district court for it to determine whether a prima facie case was made out by any of the claimants on any of their claims.⁵

⁵ We make this reference to the dissenting opinion. The opinion states as one of its essential parts that the case comes to us after a full trial. The opinion states:

Because the case was fully tried a ritualistic *McDonnell Douglas* or *Burdine* analysis need not be pursued to uphold the district court's judgment on these disparate treatment claims. See *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1985).

The dissent fails to recognize that in the *Aikens* case, the Court spoke of it as a "fully tried" case only because the requirements set out in *Burdine* had been fully met. The Court stated:

By establishing a prima facie case, the plaintiff in a Title VII action creates a rebuttable "presumption that the employer unlawfully discriminated against" him. *Texas Department of Community Affairs v. Burdine*, *supra*, [450 U.S.] at 254 [101 S.Ct. at 1094]. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 [93 S.Ct. 1817, 36 L.Ed.2d 668] (1973). To rebut this presumption, "the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection." *Burdine*, 450 U.S. at 255 [101 S.Ct. at 1094]. In other words, the defendant must "produc[e] evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, non-discriminatory reason." *Id.* at 254 [101 S.Ct. at 1094].

But when the defendant fails to persuade the district court to dismiss the action for lack of a prima facie case, and responds to the plaintiff's proof by

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B. *The Expert Witness*

Appellants contend that the trial court erred in not accepting the opinion testimony of their expert, Dr.

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offering evidence of the reason for the plaintiff's rejection the fact finder must then decide whether the rejection was discriminatory within the meaning of Title VII. At this stage, the *McDonnell-Burdine* presumption "drops from the case." 450 U.S. at 255, n. 10 [101 S.Ct. at 1094-1095, n. 10], and "the factual inquiry proceeds to a new level of specificity." *Id.* at 255 [101 S.Ct. at 1094]. After Aikens presented his evidence to the District Court in this case, *the Postal Service's witnesses testified that he was not promoted because he had turned down several lateral transfers that would have broadened his Postal Service experience.* See Tr. 311-313, 318-320, 325; App. to Pet. for Cert. 53a. The District Court was then in a position to decide the ultimate factual issue in the case. *Id.* 460 U.S. at 715, 103 S.Ct. at 1481 (emphasis added).

We also question the statement in the dissent: "As in any lawsuit, in employment discrimination cases defendants as well as plaintiffs may make their case with either circumstantial or direct evidence. Cf. *Aikens*, 460 U.S. at 714 n. 3, 103 S.Ct. at 1481 n. 3." There is nothing in *Aikens* that states that *defendants* may rely on circumstantial evidence in satisfying the requirement that they must articulate their reasons by admissible evidence. The cited note in *Aikens* states: "As in any lawsuit, the *plaintiff* may prove his case by direct or circumstantial evidence." (Emphasis added). It is difficult to understand how a claimed articulation by circumstantial evidence could meet the carefully stated requirements of *Burdine* that the reasons given are to be given "with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext. The sufficiency of defendant's evidence should be evaluated by the extent to which it fulfills these functions." 450

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Dyson. They contend that the trial court improperly rejected Dr. Dyson's testimony on the ground that he was not a statistician or economist. As we have stated above, if the court had accepted Dr. Dyson's testimony, there clearly would have been sufficient evidence from which the court could have found that the plaintiffs had made out a *prima facie* case. However, the decision by a trial court on the competency of, and what weight should be given to the testimony of, an expert is a highly discretionary one. *Ludlow Corporation v. Textile Rubber Chemical Co., Inc.*, 636 F.2d 1057, 1060 (5th Cir.1981). We are not prepared to find that the court's decision in this matter was an abuse of its discretion.

C. *The Class Action*

The record discloses much support for the appellants' contention that the trial court did not adequately require the defendants to respond to the interrogatories which they filed early in the litigation. The record discloses that the basis for the trial court's decertifying the class was the court's decision that the class lacked the financing necessary adequately to carry the action to a conclusion. However, that fact was in turn based upon an estimate of costs which the appellants stated could be obviated if the court required the defendants to furnish the additional information sought by appellants. Now

(Continued from previous page)

U.S. at 255, 101 S.Ct. at 1094. We construe the Court's language to require evidence of a sort that will give a fair opportunity to cross-examine the defendant's witnesses as to the actual reason which is testified to.

that the trial court has had a full opportunity to observe the handling of the case, which, in effect, was still tried in many respects as if it were a class action, it will be in a position to give further consideration to its decision to deny recertification when moved for by the appellants. This issue will remain open for consideration by the trial court on remand.

D. *Employment Examinations*

On several occasions during the pendency of this action, appellants filed motions with the trial court, seeking to have the court require defendants to furnish information on the examination given to respective candidates for the positions at issue in this case and the scores of the several applicants. Shortly before trial, the trial court declined to require such information and held that the validity of the employment examinations, and the information concerning them, was not a proper part of this Title VII litigation. Defendants contended, and the court held, that plaintiffs' claims that the test was discriminatory were not a part of their EEO charge and investigation and that the plaintiffs therefore lacked standing to raise this issue.

This Court has held: "[T]he filing of a charge of discrimination with the EEOC is a condition precedent to the bringing of a civil action under Title VII." *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 460 (5th Cir.1970). However, in *Sanchez*, we also stated: "[T]he specific words of the charge of discrimination need not presage with literary exactitude the judicial pleadings which may follow." 431 F.2d at 465. We have also held that "[t]he

judicial complaint is limited to the scope of the administrative investigation which could reasonably be expected to grow out of the charge of discrimination." *Griffin v. Carlin*, 755 F.2d 1516, 1522 (11th Cir.1985). We are convinced that it would be reasonable to investigate the employment examination issue based on the broad charges made by the plaintiffs.

Appellees also support their argument that the court correctly eliminated the examinations from consideration because they contend that the appellants lacked standing to sue. They base their contention largely upon their assertion that not a single one of the appellants had "failed" an exam, and that therefore they could not have been injured by the exam, no matter how discriminatory it may have been. Defendants overlook completely the fact that there was evidence to the effect that one of the elements considered by the selector for any of these positions was the relative test scores received by the applicants on the examinations. We conclude, therefore, that the plaintiffs had standing to raise this issue and the court erred in eliminating it from the case.⁶

E. *Breach of Plaintiff Holton's Conciliation Agreement*

Before becoming a party to this litigation, plaintiff Gracie Holton made a charge of discrimination. This charge resulted in a conciliation agreement between

⁶ In fact, one of the intervenors received a letter of rejection from defendants stating that one of the reasons for the rejection was that the other applicant had a higher test score on the examination.

Holton and the employer. Although she received the position she originally sought following the signing of the conciliation agreement, she claims that the agreement was breached in other respects. The trial court dismissed this claim at the conclusion of plaintiff's evidence because, as the court stated, the underlying discrimination problem had been resolved. The appellees contend that Holton has not exhausted her administrative remedies, but they overlook the fact that this Court has held that: "There is no need for the filing of timely charges with regard to the breach of a Title VII conciliation agreement. Such agreements can be enforced in federal court in the absence of any charges." *Eatmon v. Bristol Steel & Iron Works, Inc.*, 769 F.2d 1503, 1510 n. 8 (11th Cir.1985). In *Eatmon*, we stated that:

The crucial factors of Title VII jurisdiction [in the federal court] over these types of cases is not EEOC participation. It is furtherance of the congressional goal of conciliation and voluntary compliance with Title VII. . . .

Failure to permit these agreements to be enforced in federal court under Title VII could frustrate the congressional goal of compliance through conciliation.

Id. at 1512.

It is clear, therefore, that the trial court erred in dismissing the Holton claim for lack of jurisdiction.

V. CONCLUSION

The judgment of the trial court is therefore REVERSED and the case is REMANDED for further proceedings consistent with this opinion.

EDMONDSON, Circuit Judge, concurring in part and dissenting in part:

I concur in the court's opinion and judgment except for two points: I think (1) the district court's decertification of the plaintiff class was not an abuse of discretion; and (2) the district court's finding of no intentional discrimination – a finding of fact – is not clearly erroneous. I would affirm the judgment on these points.

"Questions concerning class certification are left to the sound discretion of the district court." *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986); *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 161, 102 S.Ct. 2364, 2372, 72 L.Ed.2d 740 (1982). Under some circumstances, decertification may be required where "it becomes apparent that [adequate] representation is not being afforded." *Guerine v. J & W Investment, Inc.*, 544 F.2d 863, 864 (5th Cir.1977). Such determination "is a question of fact that depends on each peculiar set of circumstances." *Id.* The district court held a hearing on decertification and found that counsel was no longer capable of adequately representing the class. After reviewing the record, I conclude that the decertification was not an abuse of discretion.

My second point, however, presents the chief reason that I write separately: to stress – in the light of Supreme Court precedent – the need to normalize the trials of employment discrimination cases. To me, the most important aspect of this case is that plaintiffs had the ultimate burden of persuading the trier of fact that defendants intentionally discriminated against plaintiffs. The second most important aspect is that the case comes to us after a

full trial, that is, the proceedings were not stopped by the grant of a motion.

Because the case was fully tried, a ritualistic *McDonnell Douglas* or *Burdine* analysis¹ need not be pursued to uphold the district court's judgment on these disparate treatment claims. See *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715-16, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983) (after trial, courts must decide whether discrimination was proved; no need to make "inquiry even more difficult by applying legal rules which were devised to govern 'the basic allocation of burdens and order of presentation of proof.' *Burdine*, 450 U.S. at 252, 101 S.Ct. at 1093"). "Where, as here, a disparate treatment case is fully tried, a Court should proceed directly to the ultimate question of intentional discrimination." *Moore v. Alabama State Univ.*, 864 F.2d 103, 105 (11th Cir.1989); accord *Powers v. Alabama Dep't of Educ.*, 854

¹ "In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), [the Supreme Court] set forth the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment. First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reasons for the employee's rejection.' Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reason offered by the defendant were not its true reasons, but were a pretext for discrimination." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981) (citations and footnotes omitted).

F.2d 1285, 1290 (11th Cir.1988) (after trial, "court generally should not refer to the various 'stages of proof' "). "[T]he only issue to be decided at that point is whether the plaintiffs have actually proved discrimination." *Bazemore v. Friday*, 478 U.S. 385, 398, 106 S.Ct. 3000, 3007, 92 L.Ed.2d 315 (1986).

The Supreme Court has consistently held that the *McDonnell Douglas* framework is not set in stone. See *Burdine*, 450 U.S. at 253-54 n. 6, 101 S.Ct. at 1093-94 n. 6; *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 577, 98 S.Ct. 2943, 2949, 57 L.Ed.2d 957 (1978) ("The method suggested in *McDonnell Douglas* for pursuing this inquiry . . . was never intended to be rigid, mechanized, or ritualistic."); *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 358, 97 S.Ct. 1843, 1866, 52 L.Ed.2d 396 (1977) ("The importance of *McDonnell Douglas* lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act."); *McDonnell Douglas*, 411 U.S. at 802 n. 13, 93 S.Ct. at 1824 n. 13.

A finding of intentional discrimination or of no intentional discrimination is a finding of fact. See *Anderson v. City of Bessemer*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985). We should view the case as any other trial in which the district judge sits as factfinder and therefore apply the "clearly erroneous" standard. *Id.*; *Bazemore*, 478 U.S. at 398, 106 S.Ct. at 3007. Contrary to the implication of today's opinion, nothing in *Burdine* precludes disposal of a case under the clearly erroneous

standard after conclusion of a full trial on the merits. *Burdine*, 450 U.S. at 260 n. 12, 101 S.Ct. at 1097 n. 12.

After hearing the evidence and observing the parties in the courtroom, the trial judge made elaborate findings about *each* plaintiff's case. Adequate evidence supported the district judge's findings that plaintiffs failed to prove that they were rejected for or that someone else was preferred for promotion on account of race; the findings were not clearly erroneous.

Plaintiffs' case of disparate treatment consisted of testimony by each plaintiff that he or she had applied for an open position, had been facially qualified, had been rejected, and that a white employee had been chosen. Plaintiffs' evidence was extremely sketchy.² The district court found that "[p]laintiffs presented their case as if the burden was on the defendant to produce all of the information and all of the explanations merely upon the making of a general charge that discrimination existed." *Walker, et al. v. Firestone, etc.*, No. TCA 79-895-MMP, slip op. at 4 (N.D.Fla. Aug. 4, 1986). The district court elaborated:

[M]ore often than not these plaintiffs could not identify who got the position, let alone whether they were truly better qualified. . . . In response, plaintiffs' counsel engaged in the

² The district court noted that "roughly 61% of the specific claims in this case [were] based on hiring decisions made after this lawsuit was filed." Given the pendency of the lawsuit, the district court was "at a loss to understand the plaintiffs' general lack of information concerning what job was applied for, when, and who received it." *Walker, et al. v. Firestone, etc.*, No. TCA 79-895-MMP, slip op. at 4 (N.D.Fla. Aug. 4, 1986).

highly irregular procedure of reading names and exhibit numbers into the record names and exhibit numbers into the record when plaintiffs' memories failed. . . . Time after time, even after engaging in this practice, plaintiffs failed to prove that the selectee in fact did not have higher qualifications and that the defendant used this reason as a pretext for engaging in discriminatory decisionmaking.

Id. at 8. The district court never determined whether plaintiffs made out a prima facie case.³ Nevertheless, defendants pinpointed each challenged employment action (to the extent plaintiffs could identify them) and introduced much testimony and other evidence supporting the employment actions.

³ Defendant moved for involuntary dismissal at the end of plaintiffs' evidence, but the court never ruled on the motion. "[W]hen defendant fails to persuade the district court to dismiss the action for lack of a prima facie case, and responds to plaintiff's proof by offering evidence of the reason for the plaintiff's rejection, the factfinder must then decide whether the rejection was discriminatory within the meaning of Title VII. At this stage the *McDonnell-Burdine* presumption 'drops from the case,' and 'the factual inquiry proceeds to a new level of specificity.' " *Aikens*, 460 U.S. at 714-15, 103 S.Ct. at 1481-82 (citations omitted).

With respect to each claim the district court, "[a]ssuming without deciding that plaintiff made a prima facie case," concluded that "the evidence does not support plaintiff's claim." *Walker*, slip op. at 13. This conclusion should preclude the necessity of a remand for determination of whether plaintiffs had made out a prima facie case. The district court has no obligation to articulate in its opinion whether a prima facie case has been made out if, upon consideration of all the evidence, the trial court is convinced there was no intentional discrimination.

Defendants put on six days of testimony by supervisors of plaintiffs and by officials of the Florida Department of State. Defendants also introduced into evidence plaintiffs' personnel files, including work evaluations and job applications. Furthermore, defendants introduced into evidence the files of the successful applicants for each of the positions for which plaintiffs allegedly applied.⁴ Through direct testimony, defense witnesses explained the contents of these files and traced the qualifications of each applicant.⁵

Considering defendants' evidence, no mystery cloaked defendants' position about why plaintiffs were not promoted. Thomas Gardner, the Assistant Secretary of State in charge of administrative matters since 1981, and several other supervisors testified that the practice of the Florida Department of State was to hire and to promote the most qualified applicants. Such testimony alone might be insufficient to meet defendants' burden of producing evidence of a legitimate nondiscriminatory reason

⁴ Plaintiffs, on hearsay grounds, objected to the introduction of job applications. The applications were admissible, if not for the truth of their contents, then as nonhearsay for what was represented to defendants about the applicants' qualifications. An employer might properly choose an applicant whose resume showed more experience than a rival's. That the information on the resume is ultimately false would not undermine the resume or application as evidence to support the legitimacy of an employment decision.

⁵ The district court, however, limited the testimony by defense witnesses on the qualification or lack of qualification of plaintiffs for the particular position applied. The court sustained plaintiffs' objection to testimony where the defense witness had no personal knowledge of the circumstances under which the decision was made.

for the employment actions. Defendants went substantially further, however, by producing evidence of applicant qualifications.

Defendants introduced evidence of the successful applicants' qualifications and produced records and other testimony which cast clouds on the qualifications of plaintiffs. Defendants presented evidence of facts that bore on the decisions to reject plaintiffs for promotion: dismissal for physically striking a supervisor; failure to take a qualifying exam at the suggestion of the supervisor; a history of conditional and unsatisfactory evaluations by both black and white supervisors; a poor attendance record; rudeness to customers; excessive errors; disruptive and loud behavior; failure to listen to criticism; lack of motivation and initiative; attendance at an unaccredited college; and misrepresentation of educational qualifications on an employment application.

In addition to presenting evidence of the relative qualifications of the employees who were promoted compared to plaintiffs, defendants introduced evidence directly attacking plaintiffs' own proof. As part of the prima facie case, plaintiff must show that she was "in fact denied an *available* position." *Patterson v. McLean Credit Union*, ___ U.S. ___, 109 S.Ct. 2363, 2378 n. 7, 105 L.Ed.2d 132 (1989) (emphasis in original). A number of the positions plaintiffs characterized as "job openings" were not in fact openings, but rather increases in grade of current employees created by the addition of new tasks to job descriptions. Some alleged "job openings" did not exist. Other "job openings" had been filled on an emergency basis by individuals who were groomed for the positions months before the job advertisements. For still others,

plaintiffs simply did not meet the minimum qualifications; or the successful candidate was a nonwhite or the decisionmaker was a nonwhite, belying the presumption of discriminatory animus. Moreover, it is not clear that plaintiffs ever submitted applications for a number of the positions allegedly denied them.

The record supports the trial court's judgment, but today's court avoids treating employment discrimination the same as any other factual question put to a judge as factfinder. Instead the court dictates, in an unprecedented way, how defendants in an employment discrimination action must present their case. The court says that the trial court committed reversible error because the trial court allowed defendants to rely heavily on circumstantial evidence to respond to plaintiffs' case based on circumstantial evidence.

Although this case was fully tried, plaintiffs and today's court invoke *Burdine's* order-of-presentation-of-proof language. Specifically, they contend that defendants failed to meet an obligation to present an issue of fact for trial because defendants did not call witnesses to say for each employment action, "I promoted ———, who I believed to be the most qualified person because . . ." But at least where, as here, plaintiffs' case is a circumstantial one, nothing in the law (including *Burdine*) demands such specific and direct evidence from defendants. As in any lawsuit, in employment discrimination cases defendants as well as plaintiffs may make their case with either circumstantial or direct evidence. *Cf. Aikens*, 460 U.S. at 714 n. 3, 103 S.Ct. at 1481 n. 3.

Plaintiffs' argument that defendants must produce pointed oral testimony⁶ was rejected by this court in *Perryman v. Johnson Products Co., Inc.*, 698 F.2d 1138, 1141, 1144 (11th Cir.1983). In *Perryman*, we reversed and vacated a trial court finding that defendant "ha[d] not articulated any legitimate, non-discriminatory reasons for its actions" where the defense had "urged that [the decisionmaker's] decisions were based on objective factors such as prior experience, education, and job performance," and where the defense had introduced evidence of comparative qualifications. 698 F.2d at 1144. We held that defendant's proffer of comparative qualifications met its burden of production although the person who made the final decisions on hiring, promotion, and determination *never testified* about the actual reasons for the employment actions.

For a plaintiff to prevail in an employment discrimination case, she is not required to make a showing that she was in fact better qualified than the person chosen for the position. *Patterson*, 109 S.Ct. at 2379. Plaintiffs "are not limited to presenting evidence of a certain type" to establish pretext. *Id.* Likewise, defendants are not limited to presenting evidence of a certain type or forced to

⁶ To support the argument, plaintiffs and the court rely on *Lee v. Russell Board of Education*, 684 F.2d 769, 775 (11th Cir.1982), and *Uviedo v. Steves Sash & Door Co.*, 738 F.2d 1425 (5th Cir.1984). Neither decision is precedent for what the court does today. This case differs from *Lee* because in this case the reason advanced by defense witnesses (promotion of the best qualified) is the same as that credited by the trial court. Unlike *Uviedo* (an opinion not binding on us in any event), defendants have produced oral and documentary evidence to show their reasons for not promoting plaintiffs and did not merely rely on background testimony of plaintiffs' witnesses.

pursue a particular means to respond to plaintiff's circumstantial case.

The teaching of *Burdine*⁷ and *Patterson*⁸, and even more plainly of *Aikens*⁹, is that employment

⁷ The Supreme Court in *Burdine* vacated a Fifth Circuit decision, *Burdine v. Texas Dep't of Community Affairs*, 608 F.2d 563 (5th Cir.1979), that required a defendant, faced with a prima facie case, to "prove by a preponderance of the evidence that legitimate, nondiscriminatory reasons for the discharge existed" and to "prove that those he hired . . . were somehow better qualified than was plaintiff." *Burdine*, 450 U.S. at 256, 101 S.Ct. at 1095 (emphasis in original). The Supreme Court held that the Fifth Circuit misconstrued *McDonnell Douglas* and "exceed[ed] what properly can be demanded to satisfy a burden of production' when it placed on the defendant 'the burden of persuading the court that it had convincing, objective reasons for preferring the chosen applicant above the plaintiff.'" *Id.* at 257, 101 S.Ct. at 1095-96.

⁸ The Supreme Court in *Patterson* reversed a Fourth Circuit decision affirming a verdict for the defendants where the judge erroneously "instructed the jury that in order to succeed petitioner was required to make [a] . . . showing that she was in fact better qualified than the person chosen for the position." 109 S.Ct. at 2378. The Court held that a plaintiff "may not be forced to pursue any particular means of demonstrating that respondent's stated reasons are pretextual." *Id.* at 2378-79.

As in other cases, the *Patterson* court held that "[t]he evidence which petitioner can present . . . may take a variety of forms." *Id.* at 2378; see, e.g., *Bazemore*, 478 U.S. at 400, 106 S.Ct. at 3009 (reversing and remanding for district court to consider, in a class action, circumstantial evidence of discrimination provided by a less than perfect salary regression analysis with the caveat that "[a] plaintiff in a Title VII suit need not prove discrimination with scientific certainty; rather, his or her burden is to prove discrimination by a preponderance of the evidence").

⁹ In *Aikens*, the trial court required plaintiff to offer direct proof of discriminatory intent and to show, as part of his prima

(Continued on following page)

discrimination trials are normal trials and that the lower federal courts have been wrong to view these trials as arcane proceedings governed by rigid mechanized formulae imposing special burdens and constraints on the parties. Reviewed as we normally review nonjury cases after a full trial, the trial judge's findings on racial discrimination here would be affirmed because they could not be described as clearly erroneous. Still we reverse. With today's decision, the court continues its resistance to the normalization of employment discrimination trials. I regret that the court is continuing in this direction. Further development of arcane rules of trial procedure does nothing to eradicate employment discrimination, but does make the trial court's job more difficult and does lead to more "errors" in trials with the result being greater expenditures of time, energy, and money on retrials.

(Continued from previous page)

facie case, that he was "as qualified or more qualified" than the people who were promoted. The D.C. Circuit reversed and remanded with instructions for the district court to reconsider its earlier finding that plaintiff had not made out a prima facie case. *Aikens v. United States Postal Serv. Bd. of Governors*, 665 F.2d 1057 (D.C.Cir.1981). The Supreme Court reversed the D.C. Circuit, holding that the issue on remand after a full trial is not whether plaintiff made out a prima facie case, but whether "the defendant intentionally discriminated against the plaintiff." *Aikens*, 460 U.S. at 715, 103 S.Ct. at 1482.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 86-3623 & 86-3727

D.C. Docket No. TCA 79-895-11

INCREASE MINORITY
PARTICIPATION BY
AFFIRMATIVE CHANGE TODAY
OF NORTHWEST FLORIDA, INC.,
(IMPACT), on behalf of itself and
its members, DIANN WALKER,
LOUVENIA JONES, PEARLIE
WILLIAMS, GRACIE HOLTON,
ROSA HENDERSON, DELORES
COLSTON, CHARLES STEWART,
BARBARA KING, DOROTHY
ROBERTS,

Plaintiffs-Appellants,

JACQUELINE ROSS, LINDA
ISAAC,

Intervenors-Appellants,

and

CLIFFORD SIMMONS,
MARGUERITE STEWART,

Plaintiffs,

versus

GEORGE FIRESTONE, as Secretary
of the State of Florida, STATE OF
FLORIDA,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Florida

Before JOHNSON and EDMONDSON, Circuit Judges,
and TUTTLE, Senior Circuit Judge.

JUDGMENT

These causes came on to be heard on the transcript of the record from the United States District Court for the Northern District of Florida, and were argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in these causes be and the same is hereby REVERSED; and that these causes be and the same are hereby REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that defendants-appellees pay to plaintiffs-appellants, the costs on appeal to be taxed by the Clerk of this Court.

EDMONDSON, Circuit Judge, concurred in part and dissented in part and filed an opinion.

Entered: February 6, 1990
For the Court:
Miguel J. Cortez, Clerk

By: Karleen McNoble
Deputy Clerk

ISSUED AS MANDATE: APR 11 1990

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 86-3623 & 86-3727

INCREASE MINORITY
PARTICIPATION BY
AFFIRMATIVE CHANGE TODAY
OF NORTHWEST FLORIDA, INC.
(IMPACT), on behalf of itself and
its members, DIANN WALKER,
LOUVENIA JONES, PEARLIE
WILLIAMS, GRACIE HOLTON,
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ROBERTS,

Plaintiffs-Appellants,

JACQUELINE ROSS, LINDA,
ISSAC,

Intervenors-Appellants,

and

CLIFFORD SIMMONS,
MARGUERITE STEWART,

versus

Plaintiffs,

GEORGE FIRESTONE, as Secretary
of the State of Florida, STATE OF
FLORIDA,

Defendants-Appellees.

FILED APR 2 1990

Appeal from the United States District Court
for the Northern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGES-
TION(S) OF REHEARING IN BANC

(April 2, 1990)

(Opinion February 6, 1990, 11 Cir., 198 __, __ F.2d __).

Before JOHNSON and EDMONDSON, Circuit Judges,
and TUTTLE, Senior Circuit Judge.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

() The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

() A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Frank M. Johnson, Jr.
United States Circuit Judge

ORD-42

* * *

11th Cir. R. 41-1 *Stay or Recall of Mandate.*

(a) A motion filed under FRAP 41 for a stay of the issuance of a mandate in a direct criminal appeal shall not be granted simply upon request. Ordinarily the motion will be denied unless it shows that it is not frivolous, not filed merely for delay, and shows that a substantial question is to be presented to the Supreme Court or otherwise sets forth good cause for a stay.

(b) A mandate once issued shall not be recalled except to prevent injustice.

(c) Unless otherwise expressly provided, granting a suggestion of rehearing in banc vacates the panel opinion and stays the mandate.

(d) Because the timely filing of a petition for rehearing will stay the mandate under FRAP 41, and because a suggestion of rehearing in banc is also treated as a petition for a panel rehearing under 11th Cir. R. 35-6, upon timely filing of a petition for panel rehearing or suggestion of rehearing in banc, the mandate is stayed until disposition thereof unless otherwise ordered by the court.

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

DIANN WALKER, et al.,

Plaintiffs,

vs

GEORGE FIRESTONE, etc.,

Defendants.

CASE NO. TCA
79-895-MMP

FILED
1986 AUG 11

FINDINGS OF FACT &
CONCLUSION AT LAW &
FINAL JUDGMENT

This cause came on for trial between April 1, 1986, and April 15, 1986 in Tallahassee, Florida. The parties were granted leave to file written briefs in lieu of oral closing arguments no later than May 15, 1986. Having considered the evidence and arguments, the Court enters the following findings of fact and conclusions at law.

As in many cases involving allegations of racial discrimination, statistical evidence was a large part of this trial. Since this was not a class action and there was no validly asserted claim of disparate impact, the value (if any) of the statistical evidence lies in whether or not it lends credence to the claims by individual plaintiffs of disparate treatment. The first matter the Court must address concerning the plaintiffs' statistical evidence is the so-called Susans deposition. The Court finds that the information gathered and reported by Ms. Susans is not reliable. One-third of the EEO-6 categories were omitted

entirely, specifically the positions designated Word Processor Systems Operator I and II, Data Entry Operator, Cashier I and II, Fiscal Ass't Supervisor II, Fiscal Ass't I and II and Staff Ass't I. Other job classifications were counted by Ms. Susans but not included in the summary of charts. The time period of the applications covered in Ms. Susans' data is uncertain. The information gathering process utilized by Ms. Susans is so undeserving of the Court's confidence that no credence can be given to these documents as the basis for any conclusions.

As for plaintiffs' expert, Dr. Dyson, the Court finds as follows. Dr. Dyson was permitted to offer opinion testimony with a proviso by the Court that his qualifications would affect the weight given his testimony. Dr. Dyson was qualified to make the mathematical calculations he performed. However, Dr. Dyson is a political scientist, not a statistician or economist, and he testified about matters beyond his expertise. Dr. Dyson had no knowledge which could help the Court evaluate the available data. Even if Dr. Dyson had been testifying within his field of expertise, the Court would disagree with his choice of benchmarks. The use of a mathematical grand mean average of applicant flow data further distorted an already unreliable data base. The Court considers applicant flow data to be the preferred data base, but only when that information is accurate. The data from which plaintiffs operated was unfortunately too seriously flawed for validity. Aside from the matters discussed above, a large percentage of the applicants were of unknown race and Dr. Dyson did not perform any sort of validation to account for the unknowns. In addition, a job by job check of the data shows that the percent of black

applicants varies from 20-80% – further demonstrating that the use of a grand mean average as a benchmark distorts the results. Distortion was also caused by the counting of applications rather than applicants. On any given day one person might have been counted numerous times.

The more reliable benchmark in this case was the census data used by defendant's expert Dr. Joan Haworth. Although plaintiffs attempted to discredit Dr. Haworth's opinions, she was testifying within her area of expertise and gave better reasoned opinions based on the available data. Dr. Haworth's testimony concerning the serious flaws in plaintiffs' data were inadequately answered because plaintiffs lacked an expert capable of responding to Dr. Haworth in her field on her level. In this regard, the Court notes that the failure of plaintiffs' attorneys to procure more capable expert testimony is further evidence of the appropriateness of this Court's earlier decision to decertify the class because the class members' interests were not being adequately protected. The statistical evidence adduced by defendant's expert witness, which was not effectively refuted by plaintiffs, demonstrates no statistical disparity in hiring or promotions based on race.

Before turning to the individual claims by the individual plaintiffs a few general remarks on the evidence are appropriate. First, the evidence did not support plaintiffs' claim that the defendant deliberately withheld pertinent information. Plaintiffs claimed to have discovered vital evidence virtually on the eve of trial while taking a deposition of one of the defendant's witnesses. While it may be true that plaintiffs gained valuable information at

the last minute deposition, it does not follow that the information had been hidden until then by the defendant. This case was pending for seven years. Plaintiffs had more than reasonable opportunity to conduct discovery, take depositions and find out that information. No one is to blame except the plaintiffs themselves if they put off asking their questions until the eve of trial.

Roughly 61% of the specific claims in this case are based on hiring decisions made after this lawsuit was filed. In view of the fact that they actually had a pending lawsuit, this Court is at a loss to understand the plaintiffs' general lack of information concerning what job was applied for, when, and who received it. Only Mr. Charles Stewart, whose records were destroyed in a fire, has any excuse for this pervasive lack of preparedness. Plaintiffs presented their case as if the burden was on the defendant to produce all of the information and all of the explanations merely upon the making of a general charge that discrimination existed. The burden of proof, however, belongs to the plaintiff. This is so even when, as here, the primary means of proof are records of the defendant. The United States Supreme Court explained in *Texas Dept. of Community Affairs v Burdine*, 450 U.S. 248, 258 (1981) that with the liberal discovery rules in Federal Courts and access to Equal Employment Opportunity Commission investigatory files it is quite fair to require plaintiff to shoulder the burden of proof.

In their written post-trial memoranda, plaintiffs continued to assert that the burden was on the defendant to prove both the comparative qualifications of the plaintiff and the person selected *and* that there was a legitimate nondiscriminatory reason for the hiring decision. Put

another way, plaintiffs attempt to place the burden on the defendant to prove that whoever was actually selected had higher qualifications than the rejected plaintiff. Yet the defendant need not prove that the successful applicant had higher qualifications, even when (as here) the justification offered for the decision is that the person thought to be most qualified was selected. See *McWilliams v Escambia County School Bd.*, 658 F.2d 326, 333 (5th Cir. 1981).

The initial burden is on the plaintiff to come forward with evidence establishing a prima facie case. The exact parameters of plaintiff's prima facie case will vary from case to case. See *McDonnell Douglas Corp. v Green*, 411 U.S. 792, 802 n. 13 (1973). In *McDonnell Douglas* the Supreme Court described the prima facie case as including evidence that:

1. Plaintiff belongs to a racial minority
2. Plaintiff applied for, and was qualified for, a job for which the employer was seeking applicants
3. Plaintiff was rejected despite being qualified, and
4. After plaintiff was rejected the position remained open and the employer continued to seek applicants with plaintiff's qualifications.

McDonnell Douglas Corp. v Green, 411 U.S. at 802. Yet in other cases the prima facie burden has been described more simply. See *McWilliams v Escambia County School Bd.*, 658 F.2d at 326 (citing *Simon v Honeywell, Inc.*, 642 F.2d 754, 755 n. 4 (5th Cir. 1981) (plaintiff can establish prima facie case with proof he is black, he applied and was

qualified for an available job, and was rejected in favor of a white.). Between these cases it is not clear whether it is part of plaintiff's burden in the initial proof to demonstrate the comparative qualifications of the person selected. Perhaps that is a factor that must vary from case to case.

Once plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate a legitimate non-discriminatory reason for the hiring decision made. In this case the defendant contends that the person believed to be most qualified was hired, unless friendship or political connections played some role. In every instance the defendant denies that race affected the decision. Making that statement satisfies the defendant's light burden. As the Supreme Court noted in *Texas Dept. of Community Affairs v Burdine*, 450 U.S. at 258, sometimes a defendant will also attempt to persuade the Court by producing evidence of the factual basis for its decision, but that is not required of the defendant. In this case the defendant did present testimony about why some of the actual selectees were better qualified. Regarding some of the contested positions the defendant supplied applications and personnel cards in support of its position that the person thought to be most highly qualified was hired. With regard to some other positions the defendant offered testimony to show why the plaintiff was considered less qualified. The Court finds that the defendant has more than sufficiently sustained its light burden of articulation with regard to each position.

Once a defendant articulates a legitimate non-discriminatory reason the burden shifts back to the plaintiff to prove that the offered reason was merely a pretext

for discrimination and that the defendant was really motivated by improper racial considerations. At this point the plaintiff's burdens effectively merge. See *Clark v. Huntsville Bd. of Educ.*, 717 F.2d 525, 529 (11th Cir. 1983). Whether or not plaintiff was required to prove as part of its prima facie case that the selectee had qualifications equal to or less than those of the plaintiff, it would be virtually impossible for plaintiff to prove the defendant's proffered explanation is unworthy of credence without some such evidence tending to show that the person selected was not more qualified. Unfortunately, more often than not these plaintiffs could not even identify who got the position, let alone whether they were truly better qualified. When plaintiffs' poor preparation and paucity of pertinent evidence became apparent during trial, the Court warned plaintiffs it would not search through the exhibits after trial for indications who was hired and what their qualifications were if there had been no testimony at all about the person or which exhibit contained the relevant information. In response, plaintiffs' counsel engaged in the highly irregular procedure of reading names and exhibit numbers into the record when plaintiffs' memories failed. Of course the defendant objected to plaintiffs' counsel effectively testifying at the trial. Time after time, even after engaging in this practice, plaintiffs failed to prove that the selectee in fact did not have higher qualifications and that the defendant used this reason as a pretext for engaging in discriminatory decisionmaking. The other way to rebut defendant's proffered explanation is to persuade the Court that a discriminatory reason more likely motivated the defendant. See *Olafson v. Dade County School Bd.*, 651 F.2d 393, 395 (5th

Cir. Unit B 1981). However, as was discussed above, the plaintiffs' statistical case was unpersuasive and the plaintiffs were not successful in establishing that racial motivations were the likely basis for the hiring and promotion decisions made by the defendant. The Court will now address the specific claims of the individual plaintiffs.

I. Plaintiff Diann Walker

Plaintiff Diann Walker applied in May 1978 for the position of Clerk V in the Division of Elections. Defendant alleges this claim is time barred. The successful applicant was a white female named Mary Anderson. Plaintiff offered no testimony of their relative qualifications except to say that Anderson had no supervisory experience, unlike the plaintiff herself. Diann Walker testified that she had never performed such normal supervisory functions as filling out evaluations and pay slips or deciding on disciplinary actions but she nonetheless had no doubt that she had supervisory experience at the time of this application. The Court finds that plaintiff did not in fact have supervisory experience. When plaintiff applied for this Clerk V position she was a Clerk-Typist III. At that time Mary Anderson held the more responsible position of Clerk IV. In fact, one month later plaintiff was promoted to the Clerk IV position vacated by Mary Anderson. Assuming, without deciding, that plaintiff's claim is not time-barred and that plaintiff has made out a prima facie case, the Court concludes that discrimination played no part in this job selection in that Mary Anderson was reasonably believed by the defendant to be the higher qualified candidate.

In February, 1979, plaintiff Walker applied for the position of Staff Ass't II in the Division of Corporations. A white male, Floyd Self, was hired. Plaintiff claims that Self was not qualified, that he was hired on an emergency basis without competition and was subsequently "waived in". Plaintiff alleges that the reason for this hiring decision was Self's political connections. Plaintiff did not allege race was a factor. Plaintiff asserts that she has stated a valid claim because, under Florida law, political connections are not a valid basis for a hiring decision. It is true that *Fla. Stat.* §110.105(2) states, in pertinent part, that all appointments, terms and conditions of employment in state government shall be made without regard to political affiliation. However, plaintiff has cited no authority under which she may state a Title VII (or §1981 or §1983) claim over the decision to hire a person with better political connections. Nor is this Court aware of any such authority, indeed, it appears the contrary is true. See 42 U.S.C. §2000e-2 (unlawful to discriminate because of race, color, religion, sex or national origin); see also *Ellis v United States Postal Service*, 784 F.2d 835 (7th Cir. 1986) (affirming dismissal of claims under Title VII, §1981 and §1983 for job discrimination based on lack of political connections); *Smith v City of Chicago*, 769 F.2d 408, 413 (7th Cir. 1985) (construing *Shakman* decision as expanding Title VII protection by "add[ing] speech and political affiliation to the list").

Furthermore, plaintiff has not demonstrated that Self was equally or less qualified by asserting that he was "waived in". Defendants introduced unrebutted testimony that persons who were "waived in" were not less qualified; rather, they were administratively determined

to have experience or other training equivalent to the minimum training and experience requirements. The application requesting a waiver for Mr. Self demonstrates his superior qualifications – a college degree (plaintiff had college coursework but no degree), course work toward a Masters degree and pertinent work experience. No actionable discrimination is evident.

In February 1979 plaintiff also applied for the position of Staff Ass't II in the Division of Elections. The person selected was Eleanor Ervin, a white female. Plaintiff claimed to be better qualified, testifying she had seniority over Ervin and that plaintiff should have received a preference since she was already employed in the Department and there was a policy to promote from within. Plaintiff's claims to be better qualified and have greater seniority than Eleanor Ervin approach the absurd. At the time of her application plaintiff was a Clerk IV. She was first employed by the State of Florida in December 1976 – 2 years and 3 months before filing this application for Staff Ass't II. Eleanor Ervin was first employed by the State of Florida in 1961, 18 years earlier, according to her application for the Staff Ass't II position (defendant's Exhibit 110). Ervin was continuously employed by the state throughout those 18 years, and from 1971-1979 she was already actually employed as a Staff Ass't II, albeit in the Governor's mansion rather than the Department of State. Plaintiff's claim that this hiring decision was the product of discrimination is patently unsupportable.

Diann Walker states that she applied in August 1979 for three Clerk V positions in the Division of Corporations. The persons allegedly selected were "Buck" Kohr, a white male, Kevin St. Louis, also a white male, and

Sandra Inks, a white female. William Kohr's personnel card (defendant's exhibit 122 (o)(1)) indicates a promotion in July 1979 from Data Console Operator to Data Console Operator Supervisor I, a reassignment in December 1979 to Clerk IV and a promotion to Clerk V in May 1980. Mr. Kohr's promotion to Clerk V came about as the result of the Clerk IV position he already held being reclassified (*see* defendant's Exhibit 122(o)(3)). More importantly, Kohr did not become a Clerk V until about nine months after plaintiff says he got the job for which she applied. As the record evidence is to the contrary, plaintiff's mere assertion that Kohr received a position for which she applied is insufficient to support a *prima facie* case.

Kevin St. Louis and Sandra Inks, on the other hand, were both promoted on July 27, 1979 to Clerk V in Corporations (*see* defendants Exhibits 107(a) and 263). Plaintiff contends these persons were unqualified and that they "leapfrogged" into the Clerk V position from that of Clerk II. To the contrary, St. Louis was a Clerk II in May 1978, was promoted to Clerk-Typist II, Data Console Operator and *then* Clerk V. Sandra Inks had been a Clerk II in September 1975. She was promoted to Data Console Operator and then (roughly one year later) to Clerk V. Plaintiff offered no other testimony or proof of their relative qualifications.

The Court finds that plaintiff was not discriminated against on the basis of race. Assuming, without deciding, that plaintiff made a *prima facie* case, the evidence does not support plaintiff's claim. Plaintiff was working in the Elections Division. St. Louis and Inks were both already working in the Corporations Division and familiar with

the work there. St. Louis had a college degree, unlike plaintiff. Inks had over a year more seniority than plaintiff. Finally, plaintiff was in fact promoted to Clerk V in the Elections Division (where she had her experience) a mere month later.

In May, 1980, plaintiff Diann Walker testified she applied for a Secretary IV position in the Division of Archives and an unknown white female was hired. It is extremely doubtful whether such an assertion can be sufficient to satisfy plaintiff's *prima facie* burden to prove that a white person was hired. Nonetheless, the defendant came forward with testimony that a white woman named Jean McElveen received a Secretary IV position in Archives at that time, when her Secretary III position was reclassified. The defendant supplied copies of Miss McElveen's personnel card and application (defendant's exhibits 197(a) and 197(b)). Unfortunately, these documents do not support the defendant's contention that the recipient of this position was McElveen. Jean McElveen was a Secretary III in Archives and her position was reclassified to Secretary IV, but in October, 1979.

Plaintiff contends in her post-trial memorandum that N. Revell got the Secretary IV position for which plaintiff applied in May, 1980. Plaintiff states that she should prevail on this claim because the defendant failed to introduce evidence of Revell's superior qualifications. Plaintiff's reasoning is off the mark. The burden never shifted to the defendant to supply any reason for selecting Revell over Walker because [sic] plaintiff never came forward with evidence that Revell was the selectee. Even if this contention that N. Revell was hired had been timely made and supported by evidence, it would not

have been the defendant's duty to prove the selectee had higher qualifications. The plaintiff has the burden of demonstrating that the selectee was not the more qualified candidate or offering some other evidence that the offered explanation was really a pretext for discrimination. The plaintiff has not done so.

At trial plaintiff Walker testified she applied in June 1980 for an Executive Secretary I position in the Division of Archives and that an unknown white female was hired. Neither plaintiff or [sic] defendant refers to this position in their post-trial memoranda. This allegation standing alone is clearly insufficient and the Court considers this claim to have been abandoned, *see McWilliams v Escambia County School Bd.*, 658 F.2d at 336 (in factually and legally complex discrimination case parties have duty to insure court's cognizance of their claims).

Plaintiff Walker testified she applied in May 1980 (and received a letter of rejection in September of that year) for a position as Secretary IV in the Office of the Secretary of State, and that an unknown white female from the office of the Attorney General was hired. The interviews were conducted by Bill Stevens, a black male. Plaintiff testified that she herself was qualified and that she knew nothing of the qualifications of the person selected. This was one of those occasions, remarked upon earlier, when plaintiff's counsel testified, in effect. Counsel read into the record, referring to plaintiff's exhibit Z33, that T. Dusseault received this position. If plaintiff's, exhibit Z33 contains any information concerning the qualifications of T. Dusseault or anyone else it is not apparent to the Court. In the written post-trial memorandum, plaintiff once again erroneously asserts that she

should prevail on this claim because of defendant's failure to offer testimony on the qualifications of the selectee. Plaintiff has failed to sustain her burden of establishing that the selectee had qualifications equal to or less than those of the plaintiff or some other evidence that it was merely a pretext when the defendant claimed to have hired the person thought most qualified.

The next position plaintiff Diann Walker asserts she was discriminatorily denied is that of Administrative Ass't II in the Division of Elections, for which plaintiff says she applied in August 1982. Plaintiff avers that the successful applicant for this job was a white female named Trannie Fewell. Plaintiff testified that Trannie Fewell lacked the requisite experience, particularly supervisory experience. The Court has already indicated that plaintiff's own claims of supervisory experience are unfounded. Fewell had a college degree, two years experience as a teacher and was with the Department of State years longer than Walker in progressively responsible positions. Plaintiff has not substantiated a claim to having equal or better qualifications than Fewell. Defendant relies on Fewell's greater seniority and college degree as justification for selecting Fewell over Walker. The Court finds that this decision was not motivated by discriminatory intent.

The facts concerning the final position for which plaintiff Walker makes a claim are somewhat confused. At trial, plaintiff testified she applied on an unknown date for an Executive Secretary II position, that Diane Recupero (a white female) was hired, and that plaintiff had more seniority and equal or better qualifications. Plaintiff's post-trial memorandum omits any mention of

this position. The defendant's memorandum contains a reference to an Executive Secretary I position applied for in late '82.

Diane Recuperero nee' Roland in fact had more seniority than plaintiff, having first been employed by the Department of State in the Division of Archives as a Secretary III in February, 1976. In comparison, plaintiff was hired as a Clerk III in December, 1976. In July, 1979, Recuperero's Secretary IV position was reclassified as an Executive Secretary I. At that time, Recuperero had more secretarial experience, more seniority and was already performing some, if not all, of the Executive Secretary duties. Recuperero never became an Executive Secretary II, her next promotion was to Staff Ass't II and then Accountant I. If plaintiff was ever denied an Executive Secretary job which was received by Diane Recuperero, Recuperero was then better qualified to fill the position and there was no discrimination.

II. Plaintiff Charles Stewart

Plaintiff Charles Stewart first asserts that he was discriminatorily denied the position of Bureau Chief of Administrative Code in July 1977. Stewart states that he met the qualifications requirement of a four year degree and three years administrative experience. Plaintiff stated further that the successful applicant was Lizzie Cloud, a white female who did not have either a four year degree or three years administrative experience. The defendant contends that this claim is time barred, an issue plaintiff does not address.

Assuming, without deciding, that plaintiff's first claim is not time barred, it is nonetheless clear that plaintiff has no basis for recovery with regard to this position. Plaintiff did have a four year degree and the fact that the school was not accredited will not be held against him since the Department of Administration accepted degrees from plaintiff's alma mater as if the school was accredited. Nor did Lizzie Cloud have a college degree, although the minimum training and experience requirements did make provision for substituting experience for college time on a year for year basis. Plaintiff's claims to several years of administrative experience are less secure. It developed at trial that some of the experience claimed by plaintiff was less responsible than he attempted to make it sound, and that in some of the years listed he actually only worked part of the Spring and Summer. Lizzie Cloud, on the other hand, had been continuously employed at the Department of State since 1966. Her responsibilities, capabilities, and the quality of her work were well known. According to her application for Chief of Administrative Code (defendant's exhibit 140) she had been performing most, if not all, the duties of that position since 1972 while classified a Clerk IV. One of Cloud's performance evaluations from 1975, while she was still a Clerk IV, contains the following statement: "Due to the workload and type work Liz does, her position should certainly be upgraded to something in a much higher classification bracket." That evaluation, defendant's exhibit 139(e), is signed by Dorothy Glisson as both Division Director and Evaluating Supervisor. The Court finds that the decision to hire Liz Cloud rather than Charles Stewart was not a product of discrimination.

Plaintiff Stewart next asserts he was discriminatorily denied the position of Bureau Chief of Election Records in early 1979 and that the job went to a white male named Rodney Bevis. In comparing their qualifications, plaintiff avers that Bevis lacked the requisite four year degree. The job description for Chief of Election Records (defendant's exhibit 53(kk)) states that the minimum training and experience is three years administrative or managerial experience and graduation from an accredited four year college, with the proviso that experience might be substituted on a year by year basis for college training. According to Bevis' resume (defendants Exhibit 69(g)) he had a two year Associate of Science Degree and some additional college-level coursework of about one year. Mr. Bevis also had at least six years of managerial experience in his positions as Assistant Manager of Bevis Funeral Home, Campaign Treasurer/ Bevis for Congress Campaign and as part owner and manager of the Corner Store. Bevis had some college, if not a four year degree, and a great deal more qualifying experience than plaintiff. No discrimination has been demonstrated in connection with this hire.

Plaintiff Stewart made a claim with regard to a Regional Representative position applied for in July 1979, but stated he did not know who, if anyone, received the job. Plaintiff's counsel testified, in effect, that he was satisfied that the recipient of the position was Carl Wall. Once again, without commenting on the propriety of this method of proof, plaintiff has still failed to sustain his burden of establishing that there was discrimination. There has been no proof of Carl Wall's race or qualifications, and therefore plaintiff cannot prevail since it was his responsibility to come forward with such evidence.

The last job for which plaintiff asserts a claim is the position of Office Operations Supervisor I, filled in October 1979. The minimum training and experience was a four year degree with a major in business or public administration and four years of administrative/management experience, provided that additional experience could be substituted for the college training (see defendant's exhibit 53z).

Plaintiff asserts he was better qualified than Ira Chester, who received the job, because Chester had only two years of college. However, in addition to his college training, Chester had over 20 years of qualifying experience. Assuming, without deciding, that plaintiff met his burden to establish a prima facie case, defendant has presented a legitimate nondiscriminatory basis for the decision. Plaintiff has not proven that this was a pretext. The Court finds that there was no discrimination involved in the selection.

III. Plaintiff Dorothy Roberts

Plaintiff Dorothy Roberts applied in February 1979 for an Accountant III position in the Division of Administrative Services. The successful applicant was Daniel Corcoran, a white male. Plaintiff testified that the minimum training and experience requirements for this job called for two years professional accounting experience. Plaintiff Roberts compared her qualifications to those of Corcoran, stating that she was the better qualified candidate. Plaintiff Dorothy Roberts testified that she had 2 1/2 years

professional accounting experience and six years supervisory experience. On the other hand, according to plaintiff, Daniel Corcoran was five months shy of the minimum two years professional experience requirement. Defendant in turn offered a legitimate reason for this hiring decision, to-wit: Corcoran was better suited due to his actual experience with the SAMAS system. Plaintiff did not attempt to prove that the offered reason was a pretext for discrimination and the Court finds that it was not. Finding no racially discriminatory motive the Court finds that Dorothy Roberts is not entitled to recover on this claim. Accordingly, plaintiff Roberts' second claim must also fail. The second claim is based on plaintiff's belief that if Ms. Roberts had received the Accountant III position discussed above she might also have gotten the promotion received by Corcoran when the position was upgraded to Accountant IV.

IV Plaintiff Barbara King

The most egregious example of the woefully inadequate presentation of evidence by plaintiffs can be found in the case of Barbara King. At trial plaintiff King testified that she was discriminatorily rejected after applying for fifteen specifically identified positions. Of those fifteen jobs, plaintiff stated, one was received by Patty Stewart, one was received by a woman named Nancy and the remainder went to persons unknown. One of those unknown persons was definitely black, according to plaintiff, and as to some of the others plaintiff had no knowledge of the race of the selectee. At the very least such claims border upon frivolousness, depending as

they do upon plaintiff's vague and unsupported subjective belief that she was a victim of wrong doing. The defendant should never have been forced to defend against such amorphous charges. Perhaps plaintiff implicitly recognized this when she omitted any reference in her post-trial memorandum to over a third of the claims which she'd raised at trial.

The first position about which plaintiff asserted a claim at trial is Clerk-Typist III. Plaintiff states she applied for this position in February 1979. The successful applicant is unknown. The Court notes that Ms. King was promoted to Clerk-Typist III in September 1979. Having failed to establish a *prima facie* case, the Court finds plaintiff has no valid claim of discrimination in connection with this position.

In March 1979 plaintiff King avers she applied for a Secretary III position. Plaintiff testified she satisfied the minimum training and experience requirements, that Patty Stewart was hired and that plaintiff had no knowledge of Ms. Stewart's qualifications. The evidence supports plaintiff's testimony, at least in part, indicating that Patricia Stewart did in fact receive a Secretary III position in February or March of 1979. It is somewhat ironic, since this is the only selectee of whose name plaintiff was sure, that plaintiff's post-trial memorandum does not list Patty Stewart as the successful applicant for any contested position. In addition to the uncertainty which exists over whether plaintiff even applied for and was denied the position received by Patricia Stewart, plaintiff failed to produce any evidence of their comparative qualifications or any other evidence that it was a pretext for discrimination when the defendant claimed to have hired the person

thought to be most qualified. Plaintiff has failed to carry the burden of proof in connection with this claim.

At trial plaintiff testified she applied for three Secretary III positions in April 1979: one in Cultural Affairs, one in the General Counsel's office and one in Archives. Plaintiff testified that the job in the General Counsel's office went to "Nancy", the other persons who were selected were not known to plaintiff. Once again plaintiff's counsel engaged in the questionable practice of testifying that plaintiff's exhibit Z33 indicates who received these jobs and proceeding to name them. According to plaintiff's post-trial memorandum two Secretary III positions, not three, were at issue in April 1979. The two successful applicants were apparently J. Munley and C. Dunn, since each is listed in the memo as the selectee for both positions. Obviously, neither of the persons named in the post-trial memorandum as a recipient of one of these positions is named Nancy. Thus plaintiff's scant recollection and her attorney's testimony do not support one another, detracting from the credibility of each. As to all of these (two or three) Secretary III positions, plaintiff failed utterly to make any meaningful comparison of her qualifications and those of the selectees, failing to rebut the defendant's assertion that the best qualified person was selected in each instance. Plaintiff offered no evidence of the selectee's qualifications, no testimony, no applications and no personnel cards. The defendant submitted the personnel cards of Cynthia Dunn (defendant's Exhibit 312) and Janus Munley (defendant's Exhibit 313) in support of its position that the most qualified persons were selected, despite the fact that the defendant was not required to

submit such proof. In Munley's case her application was also attached to the exhibit. It indicates that she had been awarded a Master's Degree in Historical Administration from Florida State University. Plaintiff offered no evidence that this was not relevant to the position of Secretary III in the Division of Archives. Dunn was hired a little over a year earlier than plaintiff and therefore had seniority in her favor. Dunn had progressed from Clerk-Typist II (the same starting position as plaintiff) to Data Console Operator and then EDP Control Clerk before being promoted to Secretary III. Plaintiff was still a Clerk-Typist II in April 1979. As stated earlier, plaintiff did not rebut defendant's justifications for the decision that these other candidates were better qualified than plaintiff.

Plaintiff testified that she applied in March 1980 for a Secretary III position in the Office of the Secretary of State and again in April 1980 for Secretary III in the same office as well as a Secretary III position in the Division of Archives, also in April 1980. The name and race of the selectee for the position for which plaintiff applied in March were unknown to plaintiff. As to each of the April applications, plaintiff testified that an unknown white person was selected. All three of these positions are unmentioned in plaintiff's post-trial memorandum and the Court considers these claims abandoned. If not abandoned, plaintiff's proof was clearly insufficient [sic] to sustain her claims.

Plaintiff King testified that she applied in May 1980 for a Word Processor Systems Operator I position and that an unknown white person was selected. Plaintiff's post-trial memo lists two persons as the selectee for this position, without any explanation ever being offered for

identifying these two people as the recipient of one job. The two persons named are L. Bishop and C. Merritt. Once again, plaintiff offered no evidence at all concerning the selectee's qualifications, failing to rebut the defendant's claim to have hired the best qualified candidate in each instance. Once again, defendant stepped forward with evidence in the form of the personnel cards and applications of the persons identified as selectees (see defendant's Exhibits 309 and 310). Even after the defendant produced this evidence, the plaintiff failed to provide any evidence or testimony that might establish that the defendant's offered reason for the hiring decision was a pretext, in view of the selectee's and plaintiff's comparative qualifications or otherwise. Plaintiff, having failed to sustain the burden of proof, cannot prevail.

The next position for which plaintiff asserted a claim at trial was that of Clerk V. Plaintiff testified that she applied in June 1980 and that an unknown white person was hired. Plaintiff makes no reference to this claim in her post-trial memorandum. The Court agrees that it warrants no further discussion.

Plaintiff testified that she applied for two Secretary IV positions, one in June 1980 and again in August 1980. In each instance, plaintiff testified, she satisfied the minimum training and experience requirements and that an unknown white person (with unknown qualifications) was selected. Plaintiff's post-trial memorandum contains a reference to only one Secretary IV position, as to which plaintiff purportedly received a rejection letter in late November 1980. It is not possible to discern which, if either, of the two Secretary IV positions about which plaintiff testified is the position which plaintiff's memo

states was awarded to L. Price. Defendant offered into evidence the personnel card and application of Lucy Price (defendant's Exhibit 311). Miss Price had a Bachelor of Science Degree and a wealth of secretarial experience. When Lucy Price applied for the Secretary IV position, she was employed in the Department of Legal Affairs as a Secretary III. Plaintiff offered no testimony comparing her experience as a Clerk-Typist III to that of a Secretary III. In fact, plaintiff offered no evidence to rebut the defendant's contention that the person thought to be most qualified was hired without regard to race.

V. Plaintiff Pearl Williams.

Plaintiff Pearl Williams testified she applied in February 1979 for a Clerk-Typist III position in the Division of Corporations. Plaintiff stated that after the position had been advertised she was told that it was being deleted without having been filled. Plaintiff was offered a promotion to Magnetic Media Operator at this time. She accepted the promotion, but then turned around and turned it down when she learned the Clerk-Typist III position was being readvertised. Plaintiff implied that the promotion she had been offered was not as good as being a Clerk-Typist III and that discrimination was the motivation behind telling her the Clerk-Typist III position was deleted and then readvertising it. Plaintiff stopped short of suggesting that the promotion to Magnetic Media Operator was offered to her for discriminatory reasons. Plaintiff testified that she could not recall whether she reapplied for this Clerk-Typist III position when it was readvertised. Thus it is not at all clear that plaintiff even made a prima facie case with regard to this position, since

it is necessary to prove one applied for an available position.

Assuming, without deciding, that plaintiff did make out a prima facie case, the Court will review the rest of the evidence. The recipient of the Clerk-Typist III [sic] position was a white female, Mary Haygood. Plaintiff did submit her own and Haygood's personnel cards (see plaintiff's exhibit S10-A) but offered no other evidence or testimony on their comparative qualifications. The personnel cards do nothing to rebut defendant's contention that the person thought to be most qualified was hired. Haygood had seniority over Williams. Disregarding her years of OPS work, Haygood was first hired by the State of Florida in a Career Service capacity in October 1975. Pearlle Williams was first hired in June 1978. Haygood was promoted from Clerk-Typist II to Data Console Operator about seven months before she received the contested Clerk-Typist III position; plaintiff was still a Clerk-Typist II at the time. The fact that plaintiff had been promoted in December 1978 to Clerk-Typist III and demoted one month later back to Clerk-Typist II due to a reorganization does not make plaintiff's qualifications equal to those of Haygood who was actually performing a higher position than Clerk-Typist II for seven months. Nor did plaintiff have any entitlement to be promoted to Clerk-Typist III at the earliest opportunity without regard to the comparative qualifications of the other applicants. Plaintiff was still a probationary employee when she was demoted. The Court finds that the defendant has articulated a legitimate reason for this hiring decision and that plaintiff has not proven that the offered reason was really a pretext for discrimination.

The next position about which Pearlie Williams complains is that of Clerk IV, for which plaintiff applied in March 1980. Plaintiff testified that a white male, Henry Allen, was hired. Although plaintiff did point out that Mr. Allen was a white male, she never contended that race was a motivating factor. The only suggestion offered by plaintiff as to why Allen was wrongfully selected instead of her was that he was the son of a State Representative. On cross-examination plaintiff testified that after Allen got the job the duties were changed to include involvement with political committees. Plaintiff offered no evidence whatsoever that the political responsibilities were not contemplated when the selection decision was made. More importantly, plaintiff has not made a claim of racially-motivated discrimination. To the extent political connections played any part in this selection, that is not actionable (see discussion above concerning plaintiff Walker's claim that Floyd Self was hired as Staff Ass't II in February 1979 because of his political connections). Even if plaintiff also meant to assert that race played an improper role in this hiring decision she would not prevail. Plaintiff testified she knew nothing of Allen's qualifications. No evidence has been offered to rebut defendant's explanation that the person thought to be most qualified was hired without regard to race.

In April, 1982, plaintiff Williams alleges she applied for a Secretary IV position and was not promoted. According to plaintiff's own testimony she was not qualified for this position, having failed and not retaken the required test. Plaintiff offered no testimony who, if anyone, received this position or what that person's race

might have been. Plaintiff has failed to state a claim for discrimination with regard to this position.

Also in 1982, although the exact month is unknown, plaintiff applied for another Secretary IV position. Apparently this is a different Secretary IV position because plaintiff testified the written test was no longer required. Plaintiff stated that this position went to Susan Lincicome, a white female. Once again, the only evidence plaintiff offered in rebuttal of defendant's contention that the person believed to be most qualified was hired were the personnel cards of the selectee and herself. While these cards do indicate that plaintiff had seniority over Miss Lincicome, that is all they tell. Miss Lincicome's application was not offered into evidence by plaintiff. The defendant did supply this application in support of its decision (defendants Exhibit 268(2)) and based on the information contained therein the Court cannot say that plaintiff was more qualified or that any inference of discriminatory motive arises from the selection of Lincicome instead of Williams. Plaintiff had a High School Diploma and some vocational school typing courses. Lincicome was better educated, holding an Associate of Arts Degree. Both candidates held the position of Secretary III when they applied. On paper their qualifications are similar enough that perhaps plaintiff might have sustained her burden of establishing discriminatory intent if she had supplied anecdotal evidence or statistical support. But plaintiff has the burden of proof and persuasion and any doubts about the actual qualifications of the two candidates must be resolved against plaintiff. See *McWilliams v Escambia County School Bd.*, 658 F.2d at 333. Plaintiff has not produced any evidence tending to show that the

defendant hired someone other than the person honestly believed to be most qualified and so her claim must fall.

Next plaintiff Williams testified that she was discriminatorily denied three Administrative Secretary positions in 1984-85. The three white females whom plaintiff contends received these positions are Barbara Birks, Elinor Kalfas and Nancy Downing. Plaintiff testified that she met the minimum training and experience requirements but offered no testimony concerning the successful applicants' qualifications. However, plaintiff did offer into evidence (plaintiffs' exhibit S10-A) their personnel cards. Nancy Downing transferred to the Department of State Division of Elections in August 1985 into a Senior Secretary position. In January 1986 her personnel card lists her job title as Administrative Secretary, but no new position number is listed so it would seem to be a renaming of the same job. There is no information about Mrs. Downing's previous experience or seniority in the Career Service. Plaintiff cannot rebut defendant's claim to have hired the person thought to be most qualified with such scant evidence. Barbara Birks' personnel card indicates she was employed in 1982 as a Secretary IV, reassigned in January 1983 to Library Tech. Ass't I and then was reassigned in February 1983 back to the Secretary IV position she'd held earlier. Miss Birks resigned from the Department of State in November 1983. Thus, above and beyond the dearth of information about qualifications, previous experience and seniority [sic], plaintiff's exhibit does not support her testimony that Birks received a position which plaintiff was denied in 1984-85. Elinor Kalfas apparently replaced Barbara Birks; she was hired into a Secretary IV position (with the same position number) in

January 1984. Assuming that this is the position to which plaintiff referred when she testified that Elinor Kalfas received an Administrative Secretary position for which plaintiff applied, plaintiff has once again failed to sustain her burden of proof. Plaintiff supplied no evidence concerning their comparative qualifications, or any other evidence, tending to show that it was a pretext for discrimination when the defendant stated that the person believed to be most qualified was hired. The same problem would defeat plaintiff if she'd meant to contest Mrs. Kalfas' promotion in July 1985 to Administrative Ass't II.

Also in 1985, plaintiff contends, she was discriminatorily denied a Secretary IV position which went to a white female named Laverne Barrett, and a Sr. Clerk position which was awarded to Miguel Hernandez. As to each of these positions, plaintiff offered no evidence other than the personnel cards of the successful applicants. The Sr. Clerk position is not even mentioned in plaintiff's post-trial memorandum. Mr. Hernandez was hired as a Clerk V; plaintiff has offered no evidence about his prior qualifications. In January 1986 Mr. Hernandez' position was apparently retitled Sr. Clerk, since no promotion, demotion, reclassification or new position number is indicated on his personnel card (plaintiff's Exhibit S10-A). Beyond the fatal failure to adduce any pertinent evidence to rebut defendant's statement that the person thought to be most qualified was hired, plaintiff appears to contest Mr. Hernandez' selection for a Sr. Clerk position he effectively already held, for which Mr. Hernandez would presumably be the best candidate, if indeed this Sr. Clerk position was ever even available to

others. Plaintiff's tacit abandonment of this claim is, perhaps, an acknowledgment of the truth of all these conclusions. As for Laverne Barrett, her personnel card (plaintiff's exhibit S10-A) indicates that she was hired as a Sr. Secretary and that in January 1986 her position was retitled 'Administrative Secretary'. Mrs. Barrett was never in a position officially titled Secretary IV. If there was competition for the Administrative Secretary position when it was retitled and if this is the position plaintiff really meant, the only evidence offered by plaintiff is that Mrs. Barrett already held the position and might well therefore have been the logical choice. If plaintiff meant to contest Mrs. Barrett's initial hire as a Sr. Secretary her claim must fall for her failure to produce any pertinent evidence to rebut defendant's statement that the person thought to be most qualified was hired. The Court notes that the defendant has supplied Laverne Barrett's application (defendants exhibit 267(2)) in support of its position. Mrs. Barrett had been employed at Florida State University as a Secretary Specialist since 1981, handling a variety of types of work using numerous secretarial skills. Plaintiff has not sustained her burden of proof.

VI. Plaintiff Louvenia Jones

Plaintiff Louvenia Jones claims she was discriminatorily denied a position as a Clerk II in the Division of Library Services for which she applied in January, 1977. Plaintiff never testified who got the job or what their qualifications or race were. Plaintiff's counsel states that plaintiff's exhibit Z33 indicates Ann Surrency, a white female, received this position. Plaintiff has provided no evidence to rebut defendant's contention that the person

thought to be most qualified was hired, no testimony, applications or even personnel cards pertaining to Ann Surrency were produced by plaintiff Jones.

The next position as to which plaintiff asserted a claim was a Clerk II job in the Corporations Division. Plaintiff stated she was rejected in a letter dated April 1977. Plaintiff Louvenia Jones offered no testimony herself regarding who received this position, what their race was or what qualifications they had. Plaintiff's counsel read into the record from plaintiff's exhibit Z33 that two white persons were hired as Clerk II in Corporations in March and April, 1977, named D. Koon and T. Brown. Once again plaintiff failed to refute the defendant's claim to have hired the person thought to be most qualified.

Plaintiff leveled a very broad charge that she was discriminatorily rejected for about a dozen Clerk I and Clerk II jobs before she was initially hired in April 1977. Plaintiff was no more specific about these positions. If plaintiff attempted to state a claim over those denials, she failed. Aside from the possibility some of those claims might be time-barred, plaintiff's assertions were too vague.

In July 1977 plaintiff sought a promotion to Clerk III in the Division of Elections. Once more, plaintiff offered no testimony about who the recipient of the job was or what that person's race was. Plaintiff's counsel informed the Court that, according to plaintiff's exhibit Z33, Pat Bridgham was hired. Still no testimony or evidence was produced by plaintiff concerning Bridgham's qualifications. Plaintiff failed to sustain her burden of proof.

Plaintiff Jones testified that in September 1978 she tried to apply for a position as a Book-keeping [sic] Machine Operator (also known as Account Clerk II). Plaintiff testified that this position went to a white male named David McCullars. Plaintiff explained that she never actually applied because she was told she had to pass a certain written test before being allowed to file an application. Plaintiff Jones took the test but she says a woman in personnel named Kathy Turner (who was McCullar's girlfriend or finaceé) lied and told plaintiff she had failed the test. It is not certain that these facts are sufficient to state a claim for discrimination based on race. First, plaintiff never actually applied for the position. One may, however, have a claim without applying, if one was discouraged because of race from filing an application. *International Brotherhood of Teamsters v United States*, 431 U.S. 324, 368 (1977). But the second problem with plaintiff's prima facie case arises out of the test set out in *Teamsters*. Plaintiff must prove that she was discouraged from applying by the defendant's racially discriminatory practices. Plaintiff has not alleged that racial discrimination had anything to do with preventing her from applying. According to plaintiff's own testimony, Turner's only motive for preventing plaintiff's application was the fact that the successful applicant to be was Turner's boyfriend.

Also going to the existence of a prima facie case, the defendant disputes whether plaintiff tried to apply for this very position. The defendant produced testimony that McCullars got a job called Account Clerk II, not Book-keeping [sic] Machine Operator. Jay Kassees, Personnel Director, testified for the defendant that there

were no Book-keeping [sic] Machine Operator vacancies in 1978 and the only such vacancy occurring in 1979 was filled by Joyce Houston, a black female. Plaintiff stated that the job titles Account Clerk II and Book-keeping Machine Operator were interchangeable. Plaintiff's position is apparently correct since Houston filled the position vacated by McCullars. The position number remained the same and only the title changed. In sum, it would appear plaintiff sought to apply for the position McCullars received but it is not established that the reason plaintiff did not apply was the defendant's racially discriminatory practices.

Assuming, without deciding, that plaintiff did establish a prima facie case, she did not sustain her overall burden of proof. Plaintiff introduced no evidence of their comparative qualifications except McCullars' personnel card (plaintiff's exhibit S10-A). It is true that McCullars moved up from Mail Clerk I to Account Clerk II. It is also true though that McCullars had almost two years seniority over plaintiff as a Career Service employee. Without more information about education and job skills and previous experience, plaintiff cannot be said to have sustained her burden of establishing that the person truly thought most highly qualified was not hired because of race.

Plaintiff testified that she applied for two Staff Ass't I positions, one in August 1981 and the other in July 1982. No testimony whatsoever was introduced by plaintiff concerning who received these positions or what the race of each recipient was. Both these claims are omitted from plaintiff's post-trial memorandum. The Court considers these claims abandoned. Alternatively, if not abandoned, plaintiff failed completely to sustain her burden of proof.

The final position regarding which plaintiff Louvenia Jones asserts a claim is that of Records Mgmt. Technician in the Division of Archives. There is some confusion over the time of plaintiff's application. At trial plaintiff testified that she applied for this position sometime in 1984. Plaintiff's post-trial memo dates this application event in December 1981. Defendant's memorandum refers to this position being at issue in February 1982. Plaintiff did offer into evidence the personnel card of Mr. Therold "Duke" Deese (plaintiff's exhibit Z10-A), the white male whom plaintiff testified received the position. Mr. Deese became a Records Mgmt. Technician in February 1982 and the Court will assume, despite plaintiff's contradictory testimony, that this is the time and position plaintiff meant.

Both Mr. Deese and plaintiff held positions as Microphotography Supervisor when they applied to be promoted to Records Mgmt. Technician. Plaintiff did have seniority over Deese, both in the Career Service and in tenure as a Microphotography Supervisor. Nonetheless, the defendant reiterated its claim to having hired the person thought to be most qualified. In support of this position, though not required to bear the burden of proof, the defendant introduced plaintiff's and Mr. Deese's applications (*see* defendant's exhibits 8c and 122k(3)) as well as testimony from plaintiff and Mr. Kassees. Plaintiff testified that her highest educational degree was a High School Diploma. Though her application shows 60 completed hours of college coursework, that was actually misleading. Plaintiff testified that she did not complete either of the two semesters she enrolled in college. Mr. Deese held an Associate of Arts Degree. In addition,

Deese had what appears to be an impressive history of job experience, including a year as a Records Supervisor for the Florida Marine Patrol. Plaintiff made no effort to rebut the defendant's offered explanation and therefore failed to sustain her burden of proof.

VII. Plaintiff Rosa Henderson

Plaintiff Rosa Henderson claimed to have been discriminatorily denied a Clerk III position in the Division of Elections in 1976 or 1977 which was awarded to an unknown white female. This claim is extremely vague and the Court finds that plaintiff failed to prove that she applied for a specific available position which was awarded to a non-minority person.

Plaintiff testified at trial that she was discriminatorily denied a Clerk III position in the Division of Corporations in 1977 which was awarded to Frieda Chesser. Plaintiff and defendant each stated in their respective post-trial memoranda that this position was awarded in 1978. The only testimony from plaintiff bearing on how her qualifications compared to Chesser's was that Chesser was already working in the Division of Corporations. That supports the defendant's contention that the person thought to be most highly qualified was hired, since Ms. Chesser would more likely be familiar with the work to be done. Plaintiff offered no evidence or testimony rebutting defendant's contention and thus failed to sustain her burden of proof.

Plaintiff testified she applied in 1977 for another Clerk III position in Corporations which went to an unknown person. Neither party mentions this claim in

their post-trial memo and the Court considers the claim abandoned.

Another claim asserted by plaintiff was for the position of Microphotographer in the Division of Archives, for which plaintiff testified she applied in 1978. Plaintiff's testimony that a white male named Gregory got this position for which she applied contradicted her deposition testimony that Louvenia Jones, a black female co-plaintiff, got the Microphotography Supervisor position for which plaintiff Henderson had applied. When recalled to the stand at the end of the trial, plaintiff contradicted all her earlier testimony and testified that Gary Reeves received this position. The plaintiff failed completely to produce sufficient credible evidence that she applied for an available position for which she was qualified and that it was awarded on the basis of race to a non-minority applicant. Furthermore, as to each of the persons whom plaintiff has testified received the job, plaintiff offered not one iota of evidence designed to rebut the defendant's claim to have hired the best qualified applicant. The defendant's motion for leave to late file an exhibit containing Gary Reeves' application and personnel card (doc 658) is DENIED AS MOOT.

Plaintiff Henderson testified that she applied in 1979 for a Clerk V position in the Division of Corporations which was awarded to Kevin St. Louis, a white male whose qualifications were unknown to plaintiff. Mr. St. Louis' qualifications for this position were discussed above in connection with the claim of plaintiff Diann Walker that she was discriminatorily denied this same position. Plaintiff Henderson has made no attempt to rebut the defendant's claim to have hired the person

thought to be most highly qualified and so her claim must fail.

Plaintiff testified that she applied in January 1980 for a Clerk V position in the Division of Corporations which went to Tony Fernandez. Plaintiff offered no evidence attempting to refute the defendant's position that the person thought to be most highly qualified was hired, not even a personnel card for Fernandez. In fact, Jay Kassees testified on behalf of the defendant that he could find no record of any Tony Fernandez ever having been employed at the Department of State. Assuming, without deciding, that plaintiff made out a *prima facie* case, she unquestionably failed to sustain the ultimate burden of proof.

Before addressing plaintiff's subsequent claims, the Court must review part of plaintiff's personnel history. Beginning in 1980, plaintiff received a series of conditional and unsatisfactory evaluations, primarily remarking on her poor attendance and bad attitude. Plaintiff was in fact demoted to Cashier in 1984 because of the continuing problem with her attitude. Plaintiff contends that her attitude was not bad, that she was given these low evaluations without justification because of her race. Rosa Henderson's bad attitude was apparent even in the Court room during the trial. The Court finds that these evaluations were not motivated by race and were properly considered when plaintiff Henderson applied for other positions.

Plaintiff testified that she applied next for the Clerk V position that became available when T. Fernandez was being replaced, sometime in 1980, and that the position

was awarded to Karon Beyer, a white female. The only evidence of Beyer's relative qualifications offered by plaintiff was her personnel card (plaintiff's exhibit S10-A). Although she had done some OPS work in Corporations, this Clerk V position was Mrs. Beyer's initial hire in the Career Service. Plaintiff has produced no evidence of what Karon Beyer's previous work experience or other qualifications were. Plaintiff has not rebutted defendant's position that the person thought to be most highly qualified was hired, particularly in view of the fact that Beyer was hired in July 1980 right after plaintiff received a six month evaluation rating of unsatisfactory (see defendant's exhibit 8I).

The next position concerning which plaintiff testified was that of Documentary Examiner in the UCC Section of the Division of Corporations. Plaintiff stated that this job was awarded to Irene Luttrell, a white female who had eight years less experience than plaintiff Henderson. In support of her claim that the defendant's contention that Luttrell was thought to be more highly qualified was a pretext for discrimination, plaintiff offered only Irene Luttrell's personnel card. Mrs. Luttrell's personnel card (plaintiff's exhibit S10-A) does indicate that she was first hired as a Data Entry Operator in the Division of Corporations in 1982. There is no need to address whether this evidence could be sufficient to refute the defendant's statement alone that the person thought to be most highly qualified was hired, because the defendant introduced into evidence Irene Luttrell's application (defendant's exhibit 285(a)). According to Mrs. Luttrell's application her work experience as a Secretary or in related positions began in 1944. Plaintiff Henderson wasn't even born until

December 1945, so her claim to eight years more experience than Luttrell is incredible. Plaintiff having failed to sustain the burden of proof, cannot prevail on this claim.

Plaintiff Henderson's last claim is over a Fiscal Clerk II position for which she applied in January 1986. Plaintiff testified that Cindy Summers, a white female, was hired and that Summers was a new hire without Department of State experience. In support of this claim, plaintiff offered Cindy Summers' personnel card. Miss Summer's was actually employed in November 1985. There is no evidence from which the Court can discern what Miss Summers' qualifications and previous work experience were. Therefore, plaintiff has failed to refute the defendant's claim to have hired the person thought to be most qualified.

VIII. Plaintiff Delores Colston

Plaintiff Delores Colston claims to have applied for an unknown number of Clerk-Typist IV, Secretary III and Secretary IV positions between 1974-1977. Plaintiff offered no testimony or evidence about who got these jobs, what their race was or what their qualifications were. The defendant asserts these claims are all time barred. Assuming, without deciding, that the claims are not time barred, plaintiff failed to make a prima facie case regarding any of these positions. There was no evidence what positions were available, which ones plaintiff actually applied for and what the race of the recipient was. All claims prior to 1977 of plaintiff Colston are denied.

In 1977 Delores Colston was discharged for disloyalty, insubordination and for physically fighting with her

superior, Liz Cloud. Plaintiff appealed her dismissal to the Career Service Commission, which held that it was not racially motivated and was justified. Plaintiff asks this Court to disregard the decision of the Career Service Commission and hold that her discharge was racially motivated. The defendant, without citing any authority, says that the Commission's determination is *res judicata* on the question of plaintiff's discharge. The Supreme Court has recently held that the findings of a State Administrative Agency, made after a hearing at which the parties had a full opportunity to litigate their claims, are not entitled to full faith and credit in a subsequent federal court Title VII action but may have both issue and claim preclusive effect in subsequent actions under 42 U.S.C. §1983. *University of Tennessee v Elliott*, 54 U.S.L.W. 5084 (July 7, 1986). Plaintiff's third amended complaint (doc 203) recites claims under both Title VII and §1981 and §1983. The preclusive effect, if any, of the prior State hearing need not be further explored since this Court is independently in full accord with that decision that race discrimination played no part in the discharge of plaintiff. It is the determination of this Court that plaintiff's discharge was not racially motivated and was justified by her actions in physically fighting with Liz Cloud.

Plaintiff claims to have been discriminatorily denied several positions after her 1977 discharge. Specifically, plaintiff claims to have applied for a Clerk-Typist III position in July 1978. Plaintiff's counsel read into the record from plaintiff's exhibit Z33 that the chosen applicant was a white female, T. Levy. Plaintiff claimed to have applied in August 1979 for an Audio-Visual Technician

job, which plaintiff's counsel stated went to A. Tyson. Plaintiff asserts a claim over a Clerk-Typist III position for which she applied in August 1979. The Court has no recollection of anyone ever testifying about who received this position. In her written post-trial memorandum plaintiff states that this position was awarded to C. German, a white female. Plaintiff also claims to have been discriminatorily denied a Secretary III Position in August 1979 which went to J. Beach, a white female, and a Secretary IV position in August 1981 which was awarded to V. Musgrove, also a white female. Assuming, without deciding, that plaintiff met her prima facie burden to establish that she applied, and was qualified for, an available position which was awarded to a non-minority applicant, as to each and every one of these positions the plaintiff failed to offer any evidence to rebut the defendant's claim to have hired the best qualified person. Furthermore, plaintiff did not admit to the reasons for her earlier discharge on these subsequent applications. The Court specifically finds that the circumstances of her discharge, taken together with plaintiff's failure to be truthful about it in later applications, fully justified the defendant's decision not to rehire plaintiff Colston.

IX. Intervenor Linda Isaac

Ms. Isaac claims to have been discriminatorily denied initial hire into six positions. The first of these was a Clerk I job, for which the intervenor says she applied in September 1977. Linda Isaac testified that she had previously been employed at Tallahassee Memorial Hospital for five years as a Clerk-Typist II and was qualified for the Clerk I position. Ms. Isaac never said who received

the job. Counsel identified D. Nichols, purportedly a white male, as the recipient of this job. Intervenor has not supplied any evidence concerning the qualifications of this selectee or otherwise demonstrating an impermissible racial motive in the hiring decision. The Court notes that the defendant has provided a copy of a personnel card and application for Diane Nichols, a white female, who does appear to have been awarded that job. Nothing in this evidence contradicts the defendant's statement that the person believed to be best qualified was hired.

Isaac alleged she was discriminatorily denied a Clerk II position for which she applied in September 1977. Counsel identified Anne Hartsfield, a white female, as the recipient of the job. Once again, no evidence of any kind was offered by the intervenor to show that it was a pretext for discrimination when the defendant claimed to have hired the person believed to be most qualified. Even when the defendant produced Mrs. Hartsfield's personnel card and application (defendant's exhibit 306) the intervenor failed to do any meaningful comparison of their relative qualifications.

Linda Isaac claimed to have been discriminatorily denied two Clerk III positions, the first of which she applied for in October 1977 and the second in March 1979. Ms. Isaac did not name the persons who received those jobs. Counsel claimed that J. Bishop and H. Balogh (both purportedly white males) were the successful applicants. For the second time, counsel would appear to have been misinformed concerning the sex of a person hired in preference to intervenor Isaac. The defendant supplied personnel cards and applications of Jane Bishop (a white female) (defendant's exhibit 302) and Howard Balogh

(defendant's exhibit 304) in support of its claim that the persons believed to be most qualified were hired. The intervenor has made no attempt to rebut the defendant's explanation, and so she has failed to sustain her burden of proof.

Intervenor Isaac asserts she was discriminatorily denied a Clerk V position in July 1980. Counsel for Ms. Isaac identified the successful candidate as Karon Beyer. The Court notes that co-plaintiff Rosa Henderson also claims to have been discriminatorily denied this position. As stated in connection with that claim, the only evidence these claimants have offered concerning Beyer's qualifications was her personnel card (plaintiff's exhibit S10-A). Although she had done some OPS work, this Clerk V position was Mrs. Beyer's initial hire in the Career Service. Without any evidence of Mrs. Beyer's previous work experience or other qualifications the intervenor cannot sustain her burden of proof. The defendant has supplied a copy of Karon Beyer's application (defendant's exhibit 122I(q)(2). Mrs. Beyer held a B.S. degree and had previous responsible experience as a store manager. Linda Isaac has not even attempted to refute defendant's explanation.

Finally, intervenor Isaac claims to have been discriminatorily denied a Clerk V position in August 1980. According to Isaac's counsel, that position went to H. Allen, a white male. Henry Allen's personnel card (plaintiff's exhibit S10-A) supports the defendant's claim to have hired the person thought most qualified. Mr. Allen was continuously employed in progressively responsible positions at the Department of State from April 1978. In further support of its position, the defendant has placed

in evidence Mr. Allen's application (defendant's exhibit 92). Intervenor Isaac cannot prevail without even having attempted to sustain her burden of proof and rebut the defense.

X. Intervenor Jacquelyn Ross

Intervenor Ross raised two claims at trial. First, Ross asserted she was discriminatorily denied a Secretary III position for which she applied in January 1979. The intervenor didn't know who got this job, but Ross' counsel stated Mary Brantley, a white female, was hired. Intervenor Ross offered no evidence whatsoever attempting to refute the defense claim of having hired the most qualified person. In support of its position, the defendant offered Mary Brantley's personnel card and application (defendant's exhibit 305). Ms. Brantley was employed at the Florida House of Representatives for 10 years in progressively responsible positions, all higher than Secretary III. Brantley's resume indicates she progressed from Secretary IV to Executive Secretary I to Staff Ass't I before becoming a self-employed court reporter. The intervenor has failed to prove that impermissible racial considerations played any part in this hiring decision.

At trial intervenor Ross also testified she was discriminatorily denied a Clerk-Typist III position in January 1980 but that she didn't know who got the job. This position is not even mentioned in intervenor's written post-trial memorandum. Jacquelyn Ross failed to make a prima facie case and abandoned this claim.

XI. Conclusion

In accordance with all of the foregoing it is the judgment of this Court that plaintiffs and intervenors take nothing by this action and let judgment enter for defendant. Jurisdiction is reserved for purposes of considering motions for attorneys fees and costs, should any be timely filed.

DONE AND ORDERED this 11th day of August, 1986.

/s/ Maurice M. Paul
United States District Judge

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the district Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

§ 1331. Federal questions

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

§ 1983 Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of

Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

§ 2000e. Definitions

For the purposes of this subchapter –

(a) The term “person” includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, or receivers.

(b) The term “employer” means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) the term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after March 24, 1972, or (B) fifteen or more thereafter, and such labor organization -

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended [29 U.S.C. 151

et seq.], or the Railway Labor Act, as amended [45 U.S.C. 151 et seq.];

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any state by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the

preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C. 401 et seq.], and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U.S.C. 1331 et seq.].

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

§ 2000e-1. Subchapter not applicable to employment of aliens outside State and individuals for performance of activities of religious corporations, associations, educational institutions, or societies

This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of

individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

§ 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge an individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any

individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices

It shall be an unlawful employment practice for a labor organization -

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or

employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such

school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organizations

As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950 [50 U.S.C. 781 et seq.].

(g) National security

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if -

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be

performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

- (h) **Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions**

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences [sic] are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or

to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29.

(i) Businesses or enterprises extending preferential treatment to Indians

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community,

State, section, or other area, or in the available work force in any community, State, section, or other area.

§ 2000e-3. Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

(b) Printing or publication of notices or advertisements indicating prohibited preference, limitation, specification, or discrimination; occupational qualification exception

It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to print or publish or cause to be printed or published any notice or advertisement relating

to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

Federal Rules of Evidence Rule 301

Rule 301. Presumptions in General in Civil Actions and Proceedings

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

Federal Rules of Evidence Rule 1001-1005**Rule 1001. Definitions**

For purposes of this article the following definitions are applicable:

(1) Writings and recordings. "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) Photographs. "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.

(3) Original. An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original".

(4) **Duplicate.** A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recordings, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.

Rule 1002. Requirement of Original

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.

Rule 1003. Admissibility of Duplicates

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

Rule 1004. Admissibility of Other Evidence of Contents

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if –

(1) **Originals lost or destroyed.** All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) **Original not obtainable.** No original can be obtained by any available judicial process or procedure; or

(3) **Original in possession of opponent.** At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

(4) **Collateral matters.** The writing, recording, or photograph is not closely related to a controlling issue.

(As amended Mar. 2, 1987, eff. Oct. 1, 1987.)

Rule 1005. Public Records

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with rule 902 or testified to be

correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

Federal Rules of Civil Procedure 52(a)

Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, the judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

100a

Respectfully submitted,

RICHARD M. DUNN
Counsel of Record

BARBARA A. EAGAN
DUNN, DRESNICK & LODISH, P.A.
2400 One Biscayne Tower
2 South Biscayne Boulevard
Miami, Florida 33131
(305) 374-4401



In The
Supreme Court of the United States

October Term, 1990

THE SECRETARY OF THE STATE OF FLORIDA,
and THE STATE OF FLORIDA,

Petitioners,

v.

DIANN WALKER, LOUVENIA JONES, PEARLIE
WILLIAMS, GRACIE HOLTON, ROSA HENDERSON,
DELORES COLSTON, BARBARA KING, DOROTHY
ROBERTS, JACQUELINE ROSS, LINDA ISAAC,
and CHARLES STEWART,

Respondents.

**RESPONDENTS' BRIEF IN OPPOSITION
TO THE PETITION FOR WRIT OF CERTIORARI**

JERRY G. TRAYNHAM*
BENJAMIN R. PATTERSON
PATTERSON AND TRAYNHAM
1215 Thomasville Road
Post Office Box 4289
Tallahassee, Florida 32315
Telephone: (904) 224-9181

Attorneys for Respondents

**Counsel of Record*

QUESTIONS PRESENTED

1. Under *McDonnell Douglas-Burdine* standards, may a defendant meet its articulation burden by merely contending it has a general policy of selecting the best qualified applicant and producing evidence of the personal characteristics of the plaintiff and the person selected, without producing any evidence of the specific reasons for its selection decision. In other words, is it sufficient for a defendant to provide the trial judge some part of the data which may have been available to and considered by the decision-maker, and allow the judge to determine whether any non-discriminatory rationale can be fashioned from the available data?*
2. After a discrimination case has been tried, and a defendant has pretermitted the *McDonnell Douglas-Burdine* order of proof by failing to rebut the inference of discrimination by providing a clear and reasonably specific explanation for the employment decision such that the plaintiff is afforded a full and fair opportunity to demonstrate pretext, whether the trial court should, nevertheless, proceed to decide the issue of intentional discrimination without regard to the defendant's failure of proof?

* The Petitioners' statement of this issue is not fairly raised either by the evidence or by the decisions of the courts below.

PARTIES TO THE PROCEEDINGS

The Petitioners' description of the parties below is essentially correct. In addition, Clifford Simmons was on active duty in the United States Armed Forces at the time of trial. His claims were severed, and ultimately settled between the parties.

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No. 90-32

In The
Supreme Court of the United States
October Term, 1990

THE SECRETARY OF THE STATE OF FLORIDA,
and THE STATE OF FLORIDA,

Petitioners,

v.

DIANN WALKER, LOUVENIA JONES, PEARLIE
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and CHARLES STEWART,

Respondents.

**RESPONDENTS' BRIEF IN OPPOSITION
TO THE PETITION FOR WRIT OF CERTIORARI**

The Respondents, Diann Walker, Louvenia Jones, Pearl Williams, Gracie Holton, Rosa Henderson, Delores Colston, Barbara King, Dorothy Roberts, Jacqueline Ross, Linda Isaac, and Charles Stewart, urge the Court to deny the petition for writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in this proceeding on February 6, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 893 F.2d 1189, and is reprinted in the Petitioners' Appendix at 1a. The memorandum decision of the United States District Court for the Northern District of Florida (Paul, Maurice M.) has not been reported, and is reprinted in the Petitioners' Appendix at 36a.

JURISDICTION

The Court's jurisdiction has been invoked by the Petitioners pursuant to 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

- 28 U.S.C. § 1254(1)
[Reprinted in Petitioners' Appendix at 81a]
- 28 U.S.C. § 1291. Final decisions of district courts
[Reprinted in Petitioners' Appendix at 81a]
- 28 U.S.C. § 1331. Federal question jurisdiction
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- 42 U.S.C. § 1981. Equal rights under law
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- Fed.R.Civ.P. 52(a). Findings by the court
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[Reprinted in Petitioners' Appendix at 95a]

Art. X. Contents of Writings, Recordings, and Photographs, Fed.R.Evid. 1001-1005

[Reprinted in Petitioners' Appendix at 96a]

STATEMENT OF THE CASE

Proceedings before the District Court:

The Applicants¹ invoked the jurisdiction of the federal district court under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., under 42 U.S.C. §§ 1981 and 1983, and pursuant to 28 U.S.C. §§ 1331 and 1334. The action was initially filed on June 19, 1979. At the time of trial, the amended complaint alleged individual incidents of disparate treatment, together with allegations of a pattern and practice of both disparate treatment and disparate impact. The pattern and practice claims included claims the Employer utilized an employment system in which predominately white supervisors were accorded wide latitude in making subjective decisions regarding hiring, promotion, evaluation and other terms of employment, and that the system thus facilitated ready expression of conscious and unconscious racial animus, and, additionally, had a disparate impact on black employees and applicants. The amended

¹ Petitioners' Statement of the Case is substantially correct. Our departures are noted below. To maintain some consistency with the Petitioners' brief, Respondents will be referred to as "Applicants", and the Petitioners will be referenced as either the "Employer" or the "Agency."

complaint also alleged the Employer utilized written employment examinations in making employee selection decisions, which had a disparate impact on black employees and were not justified by business necessity. (R4-203; App. 3a-5a).

The Employer's statement at p. 3 of the petition that the Applicants' claims were "predominantly promotional claims" is accurate in only the most technical sense. The employment system did not utilize classical lines of progression, in which an employee progressed from one job to another up the advancement ladder. Current employees and outside applicants generally competed with one another. The employment system recognized "appointments", with the character of the appointment dependent on the status of the selectee at the time of appointment. A current employee who received an appointment to a higher position received a "promotion appointment", whereas an outside applicant receiving the same position received an "initial appointment." Approximately two-thirds of the Applicants were seeking promotion appointments.

The case proceeded as a class action for approximately five years, but was decertified when the district court decided counsel were not financially able to adequately represent the class. (App. 3a). The Applicants had filed discovery motions, seeking to compel the production of data regarding written employment examinations, which they contended were a rich and relatively inexpensive source of applicant flow data, which could be used to prosecute the class claims. (App. 3a). The Applicants also sought the information, because relative scores on the

employment tests were used by decision-makers in making employment selections. (App. 18a). The motions remained pending for two years. Approximately three weeks prior to trial, Applicants filed an emergency motion requesting expedited treatment of the request for information on employment examinations. Four days prior to trial, the district court denied the request, holding employment examinations were not within the scope of the litigation. (App. 4a-5a).

At trial, each Applicant proved, at a minimum, that he or she was a member of a racial minority (black), that he or she applied for and was qualified for a specific job for which the employer was seeking applicants, that he or she was rejected and the Employer either continued to seek applicants of the same qualifications or filled the position with another applicant.² In most instances, the Applicants demonstrated the persons selected to fill the positions applied for were of the white race. (App. 6a). The Applicants also proved that the selection process was intended to be and is fundamentally subjective, and that the overwhelming proportion of persons making the hiring decisions were white persons. (App. 7a-8a).

Following Applicants' proof, the Employer produced no evidence which addressed the motivation or rationale

² These facts apply to those claims which the Applicants appealed to the Court of Appeals. There were some claims concerning which the Employer provided a clear and reasonably specific explanation for the employment selection, and the district court's findings were not clearly erroneous. These were not submitted to the Court of Appeals, though at pp. 4 and 5, the Employer's petition continues to treat them as present.

for any of the employment selections at issue. (App. 6a-7a). The Employer's statements, beginning at page four of the petition, to the effect that it "asserted" or "contended" that its employment decisions were based on qualifications of the applicants is highly misleading. No witness testified regarding the motivation of the decision-maker or the rationale for the selection for any of the claims at issue. No witness even contended that any of the employment selections at issue were made on the basis of relative qualifications. The statements that the Employer "asserted" or "contended" that its decisions were based on qualifications can only refer to the arguments of its attorneys following the close of evidence.

The Employer's evidence consisted predominantly of information elicited through its principal personnel official. The personnel officer, who was first employed almost five years after this litigation began, testified it was the Agency's general practice to hire the "most qualified" applicant. There was no testimony as to what the Employer or the particular decision-maker considered as a "qualification." There was no testimony by any decision-maker that any of the employment decisions were made on the basis of the best qualifications. (App. 6a-7a). It is true, as stated at page four of the petition, that the Employer submitted a substantial quantity of documentary evidence, consisting primarily of the contents of personnel files, skeletal employment histories, performance evaluations, and job applications, including the applications of the individuals selected.³ There was no

³ Job applications prepared by the selectees were admitted over objection, without any foundation, other than that they were received by the Employer, and without any evidence they were relied upon by the decision-makers.

evidence, however, that any decision-maker relied upon any specific parts of the documentary evidence, nor was there any evidence submitted with respect to the relative value of employment credentials revealed by the documentary evidence (education, particular kinds of work experience, etc.) to any of the jobs at issue.

It is true, as stated at pages four and five of its petition, that the Employer was able to cull from the often extensive work histories of several of the Applicants a limited number of incidents of inappropriate work behavior.⁴ The Employer, however, submitted no testimony or other evidence that any of the incidents were relied upon by a decision-maker or formed the basis of the Employer's rationale with respect to any of the claims at issue.

The Employer has never argued at any point in this litigation that it was unable to obtain testimony from the decision-makers or submit other evidence of the specific reasons for each of the employment decisions at issue.

The trial court assumed, without deciding, that the Applicants established a *prima facie* case and ruled that the Employer had sufficiently met its burden of production. The district court held:

In this case, the Defendant contends that the person believed to be most qualified was hired, unless friendship or political connections played some role. In every instance, the Defendant denies that race affected the decision. Making

⁴ Some of the examples given, however, do not relate to claims currently before the Court. Others have been mischaracterized.

that statement satisfies the Defendants' light burden.

(App. 41a). The district court held the Employer met its burden of articulation by merely *contending* that the persons believed to most qualified were hired, and because it *denied* that race was a factor in its decision. (App. 9a-10a). Because of its view of the Employer's production burden, the district court criticized the Applicants' ability to respond to the Employer's evidence. The trial court then held Applicants had failed to demonstrate pretext, and entered judgment for the Employer on all of the claims. (App. 43a-80a).

Proceedings before the Eleventh Circuit:

Applicants invoked the jurisdiction of the Eleventh Circuit Court of Appeals, pursuant to 28 U.S.C. § 1291. The Circuit Court identified five issues which merited its attention on direct appeal: (1) Whether the Employer sufficiently articulated a legitimate non-discriminatory reason for each employment selection; (2) Whether the district court improperly discounted the expert testimony submitted by Applicants; (3) Whether the trial court erred in not recertifying the class; (4) Whether the trial court erred in excluding employment examinations; and, (5) Whether the district court erred in dismissing one of the individual claims. (App. 8a).

The Eleventh Circuit panel held the Employer failed to articulate a clear and reasonably specific legitimate non-discriminatory reason for each of the employment

selections at issue. "In not a single case, did the defendants offer proof by any person who made the employment decision, or by any other person, stating that the decision was made on the basis of what he or she thought demonstrated the best qualified person." (App. 11a; emphasis supplied). The Court reasoned the Employer's proof must be judged, in part, by the extent to which it fulfilled the function of framing the factual issue, so that the opposing parties would have a full and fair opportunity to demonstrate pretext. "[T]he defendants offered no evidence explaining any employment decision." (App. 12a-14a).

The statement of the Employer at pages 5 through 14, to the effect that the Circuit Court held the employer *must* submit the oral testimony of the actual decision-maker, is inaccurate. The Court held only that a defendant's articulation must address the employment selection in a way which explains with reasonable specificity why the particular selection was made. A simple statement that the defendant has a general policy of hiring the best qualified applicant will not suffice. (App. 11a-14a). The Court remanded to the trial court for an initial determination whether a *prima facie* case was established by any of the Applicants. (App. 14a).

The Eleventh Circuit determined the trial court improperly eliminated the issue of employment examinations from the litigation. It remanded to the trial court with respect to that issue, and for a further determination whether the class should be recertified. The Court also reversed the Rule 41(B) dismissal of one of the individual claims, and remanded. (App. 16a-19a). The Court determined the trial judge did not abuse his discretion in

rejecting the testimony of the Applicants' expert witness. (App. 16a).

WHY THE WRIT SHOULD BE DENIED

POINT 1

Under *McDonnell Douglas-Burdine* standards, may a defendant meet its articulation burden by merely contending it has a general policy of selecting the best qualified applicant and producing evidence of the personal characteristics of the plaintiff and the person selected, without producing any evidence of the specific reasons for its selection decision. In other words, is it sufficient for a defendant to provide the trial judge some part of the data which may have been available to and considered by the decision-maker, and allow the judge to determine whether any non-discriminatory rationale can be fashioned from the available data?

The Eleventh Circuit's decision in this case studiously follows the prescriptions of this Court in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 257, 101 S.Ct. 1089 (1981). In no sense did the Court of Appeals hold, as urged by the Employer, that the burden of production can only be met by the oral testimony of the actual decision-maker. The Appellate Court merely rejected, as insufficient under this Court's precedents, an articulation which consisted of "[i]n not a single case, . . . proof by any person who made the employment decision, or by any other person, stating that the decision was made on the basis of what he or she thought demonstrated the best qualified person." (App. 11a; emphasis supplied). The Eleventh Circuit panel was concerned, not

with who provided the Employer's evidence, but with the content and quality of the explanation given.

Qualifications for selection of an employee can depend upon seniority, length of service in the same position, personal characteristics, general education, technical training, experience in comparable work or any combination of them. A mere statement that the employer hired the best qualified person leaves no opportunity for the employee to rebut the given reason as a pretext, which the employee must do if a proper reason is articulated.

(App. 12a).

The Eleventh Circuit's reasoning was right on point. The Employer's principal argument below was that it was "sufficient if they introduced evidence showing dissimilarities in two applicants' records so that the court could then decide which was better qualified." (App. 11a). The error in the Employer's approach is it ignores the fact that the *Burdine* formulation is calculated to deal with disparate treatment. The question is not whether a fair minded person might have reached the decision urged by the employer, but rather, whether the actual decision-maker was motivated by racial considerations.

The Employer's approach actually runs counter to the formulation under *Burdine*, which "is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." *Burdine*, 450 U.S. at 254 n.8, 101 S.Ct. 1089 at 1094 n.8. The Employer's approach leaves the district court to sift through the evidence in search of an adequate rationale for the employment decision, since the explanation it requires is neither "clear [nor] reasonably specific." *Id.*, 450 U.S. at

258, 101 S.Ct. at 1096. Here, the Employer's evidence simply does not "bear [] on the critical question of [intentional] discrimination." *Furnco Construction v. Waters*, 438 U.S. 567, 577, 98 S.Ct. 2943, 2949 (1978). The "factual inquiry" in a Title VII case is "whether the defendant intentionally discriminated against the plaintiff." *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 717, 103 S.Ct. 1478, 1482 (1983), quoting *Burdine*, at 101 S.Ct. 1093.

The Court of Appeals did not hold in this case that a defendant must produce as evidence the oral testimony of the actual decision-maker, or that a defendant is limited, in making its articulation, to any particular character of admissible evidence. It held, simply, that the employer's explanation must be made through admissible evidence, not the contentions of its counsel after trial. The explanation must be clear and reasonably specific, and must address the reasons for the employment decision at issue.

The Employer's argument, at page 9 of the petition, that defendants will face an "impossible situation . . . where the actual decision-makers are unavailable, unable, or unwilling to testify" is not fairly presented by this case. The Employer never even suggested below that any of the decision-makers of selections at issue here were unavailable, unable or unwilling to testify at trial. Indeed, although the issue was never mentioned in the trial court, the record incidentally indicates that a number of the decision-makers were, in fact, available, and suggests the evidentiary shortfall was a calculated trial tactic. Moreover, the Employer's personnel system is peculiarly suited to permit it to produce, whenever necessary,

admissible evidence of the reasons for selection decision other than the testimony of the decision-makers. Under the Employer's structured selection process, applications are accepted by the personnel office only from persons deemed qualified. These are placed in a selection packet, together with a listing of the applicants, which also contains data on race, sex, national origin, and other characteristics, and is provided to the decision-maker. The decision-maker interviews applicants, makes his selection, records his notes on the appropriate sheet, and returns the packet to the personnel office, where it is thereafter maintained. Florida's public records act, Chapter 119, Florida Statutes, prevents routine destruction. (Plaintiffs' Trial Exhibit Z51-B pages 13-30). These and similar records are available or adaptable to meet the exigencies described by the Employer.

The decisions of other circuits set forth in the Employer's petition at pages 10-12 do not conflict with the decision in this case. In each instance, the argument proceeds on the erroneous presumption the Eleventh Circuit limited evidence to the oral testimony of the decision-maker. The Fifth Circuit's decision in *Bernard v. Gulf Oil Corp.*, 890 F.2d 735 (1989), does not fairly address the issue. In *Bernard*, the plaintiffs did not prove they had applied for jobs by "expressing interest", and thus failed to establish a *prima facie* case. The court's "arguendo" determination that the defendant sufficiently articulated is both dicta, and logically inconsistent. *Id.*, at p. 745. In *Mills v. Ford Motor Co.*, 800 F.2d 635 (6th Cir. 1986), the district court found the defendant had sufficiently articulated its reasons by producing evidence of its policy of

terminating supervisors with two unsatisfactory evaluations, together with the employee's evaluations, although the decision-maker did not testify. The decision is not inconsistent with this case. Likewise, the decision in *McDonald v. United Airlines, Inc.*, 745 F.2d 1081 (7th Cir. 1984), is not only consistent with this case, it supports the decision below. As in this case, mere argument of counsel was insufficient. *Mitchell v. Baldrige*, 759 F.2d 80 (D.C. Cir. 1985), addresses circumstances in which the district court may grant a Rule 41(B) motion following the close of plaintiff's case, though the plaintiff may have proven a *prima facie* case. *Mitchell* is consistent since the court clearly required an articulation by the defendant during the course of plaintiff's case, and a specific finding by the court that the plaintiff had fair notice of the articulated reason and a full opportunity to rebut it. The decision in *Gray v. Univ. of Arkansas at Fayetteville*, 883 F.2d 1394 (8th Cir. 1989), illustrates the soundness of the decision below, rather than conflicts with it. In *Gray*, the court held a defendant may meet its articulation burden by giving false reasons for its actions, thereby requiring the plaintiff to establish pretext. Giving even false reasons⁵ serves the dual purposes for requiring a defendant to articulate. It serves to frame the factual inquiry and rebut the *prima facie* presumption, and it affords the plaintiff an opportunity to demonstrate pretext. In this case, the Employer submitted no reasons for the employment decisions.

⁵ Of course, if the defendant openly admitted the reasons were false, pretext would be established.

POINT 2

After a discrimination case has been tried, and a defendant has pretermitted the *McDonnell Douglas-Burdine* order of proof by failing to rebut the inference of discrimination by providing a clear and reasonably specific explanation for the employment decision such that the plaintiff is afforded a full and fair opportunity to demonstrate pretext, whether the trial court should, nevertheless, proceed to decide the issue of intentional discrimination without regard to the defendant's failure of proof?

The Employer's argument, beginning at page 14 of the petition, that after a case is "fully tried", the court should dispense with the constituent parts of the *Burdine* analysis, even when the defendant does not provide an explanation for its actions, fails to account for the evidentiary function of the requirement that a defendant articulate.

The plaintiff's *prima facie* case serves the important function of "eliminat[ing] the most common non-discriminatory reasons for the plaintiff's rejection." *Burdine*, at 101 S.Ct. 1094. After the plaintiff establishes a *prima facie* case, the burden passes to the defendant to "rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate nondiscriminatory reason." *Id.* The defendant's articulation serves the important functions

to meet the plaintiff's *prima facie* case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.

Id., at 101 S.Ct. 1095. The sufficiency of the defendant's articulation is to be judged by the extent to which it fulfills the foregoing functions. *Id.* Where the defendant fails to meet its light burden of explaining the reasons for its actions, however, the litigation cannot be considered to have been "fully tried", as urged by the Employer, because the failure of the defendant to articulate denies the plaintiff an opportunity to demonstrate pretext. "[I]f the employer is silent in the face of the presumption [created by plaintiff's *prima facie* case], the court must enter judgment for the plaintiff because no issue of fact remains in the case." *Id.*, at 101 S.Ct. 1094.

In this case, the Employer submitted no evidence of the reasons for any of the employment decisions at issue. Notwithstanding the dissent below, this is not a case in which the rationale for the employment selections was reasonably discernable by the Applicants. Even had the Applicants assumed the Employer relied upon "qualifications", they had no method to discern what each decision-maker considered a "qualification", or what qualifications were pivotal in the selection for each job at issue.⁶ Neither the Applicants, nor the district court, received any explanation from the Employer from which to determine why the employment selections were made.

⁶ Even with respect to the few incidents of inappropriate behavior culled by the Employer from several of the Applicants' employment records, the Applicants had no basis from the circumstances of their applications or the evidence at trial to believe the incidents played a role in the employment decisions.

Because the Employer stood silent in the face of Applicants' *prima facie* case, the action was not "fully tried." The Eleventh Circuit correctly distinguished this case from *Aikens*.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the Eleventh Circuit should be denied.

Respectfully submitted,

JERRY G. TRAYNHAM*
BENJAMIN R. PATTERSON
PATTERSON AND TRAYNHAM
1215 Thomasville Road
Post Office Box 4289
Tallahassee, Florida 32315
Telephone: (904) 224-9181

Attorneys for Respondents

*Counsel of Record

④
No. 90-32

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JOSEPH F. SPANOL, JR.
CLERK

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PETITIONERS' REPLY BRIEF

RICHARD M. DUNN
Counsel of Record

BARBARA A. EAGAN
DUNN, DRESNICK, & LODISH, P.A.
2400 One Biscayne Tower
2 South Biscayne Boulevard
Miami, Florida 33131
(305) 374-4401

Attorneys for Petitioner

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INTRODUCTION

In Respondents' Brief in Opposition at i, 9, Applicants attempt to diminish the issue which the Eleventh Circuit's decision raised. The Eleventh Circuit by its decision, contrary to Applicants' argument, does change the established discrimination trial standards. Further, the decision places what could be an insurmountable burden on the defendant to produce testimony of the actual decisionmaker in order to successfully rebut a *prima facie* case.

ARGUMENT

The discrimination claims here involved employment decisions made years before trial – sometimes ten years before. The actual decisionmaker in a majority of instances had no independent recollection of the decision or was unavailable to testify. Testimony concerning an established policy to hire the most qualified coupled with documentary evidence in the form of employment records is sufficient to establish employer's articulation¹.

¹ In fact, Florida evidence included: testimony by Jay Kassees – the chief personnel official – which described and explained a). personnel rules, regulations and policies concerning each position [*see, e.g.*, R. 34-24; R. 34-27-28; R. 34-104; R. 34-116-117; R. 35-20; R. 35-35; R. 35-43]; b). personnel cards for each Applicant which contained date of hire, general employment history, demotions, etc. [*See, e.g.*, R. 28-28-37; R. 29-57; R. 29-101; R. 34-5; R. 34-25; R. 34-42; R. 34-52-53; R. 34-103]; the personnel files for each Applicant; [*See, e.g.*, R. 28-41-46; R. 29-61; R. 29-111; R. 34-43-45; R. 34-109; R. 35-21-28]; c). Plaintiffs' conditional performance reviews [*see, e.g.*, R. 28-37-41; R.

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The failure to call an actual decisionmaker is simply an additional evidentiary factor to be considered by the factfinder in deciding the pretext issue. Petition for Writ at 10, *Mills v. Ford Motor Comp.*, 800 F.2d 635, 639 (6th Cir. 1986).

The Petition should be granted. The Eleventh Circuit decision conflicts with precedent decisions of this Court and those of the lower courts in its *new* requirement that a specific form of testimonial evidence is necessary to constitute a successful employers' legitimate-reason articulation [See Petition, at 6-14].

Based on argument which is internally inconsistent, Applicants contend that the Eleventh Circuit did not mean that the actual decisionmaker must testify in order for employer to fulfill its burden to articulate a legitimate reason. Applicants assert that the Eleventh Circuit simply meant that *some person* must testify as to the subjective reasons for each decision. This is a distinction with no foundation – who but the actual decisionmaker could testify concerning subjective impressions? Interestingly at trial, Applicants successfully objected to introduction of opinion testimony, from e.g., the State of Florida Personnel Director, concerning the weight factors relevant to each candidate's credentials for a particular position and

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28-46-51; R. 34-6-12; R. 34-33-38]; d). performance appraisal system [see, e.g., R. 28-41-46]; e). class specifications for each position at issue [see, e.g., R. 29-58; R. 34-48; R. 34-142; R. 35-36]; f). attendance and leave sections [R. 34-35-38]. Florida also introduced testimony by supervisors and fellow employees [see R. 28-52-71; R. 29-30-47; R. 34-58-71; R. 34-82-93; R. 35-2-13; R. 35-75-86].

concerning which qualities would make the selectee the superior candidate. [See n.1 *supra* and R. 29-59-60, 64-65, 96, 113-14].

Further, an evaluation by the State of Florida Division of Administration concerning whether a candidate possesses the minimum qualifications to be considered for a position – a first step in the application process – does not establish that a candidate is qualified for a particular position. Some applicants, e.g., misrepresented their credentials on their employment applications. [See R. 27-19]. Applicants' contention that each individual's claim on appeal was one in which the individual established minimal qualification is erroneous. [Respondents' Brief at 5].

Applicants in support of the Eleventh Circuit's decision, assert that they were unable to establish pretext because "Employer produced *no evidence* which addressed the motivation or rationale for any of the employment selections at issue." Respondents' Brief at 5-6. In fact, Florida presented a quantity of evidence to establish the reason for the hiring decision in each instance. Applicants and the Eleventh Circuit mischaracterize employer's objective and documentary evidence as a presentation which fails to establish a reasonably specific legitimate reason. Florida's evidence in rebuttal constituted a clear articulation. Plainly, the Eleventh Circuit decision departs from burden of production standards established under the *McDonnell Douglas-Burdine* cases and their progeny, i.e., that employer maintains the burden to present *evidence* of a legitimate reason.

The Eleventh Circuit decision and its characterization by Applicants here, in effect places upon the employer the burden of proof – a burden which under *Burdine* standards is to be carried at all times by plaintiffs. Employer does not maintain the burden of *proving* that the actual decisionmaker did not reject the plaintiff because of racial animus. Employer simply has the burden to *produce* evidence that its decision had a legitimate basis after Applicant establishes a *prima facie* case. Under the applicable case law, the production by employer can occur through submission of subjective or objective, testimonial or documentary evidence. See *Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983). Under any of those circumstances the employer's asserted reasons becomes clear enough to allow applicants to attempt to establish pretext.

Where an employer presents testimony that it is the employer's policy to hire the most qualified, and the employer then introduces each applicant's record, the applicant then has sufficient evidence for going forward – contrary to Applicants' assertion here. For example, if the employer presents the successful candidate's credentials which show five years of experience and a college degree, applicant could easily attempt to cast aspersion on employer's articulation by showing that applicant also has a college degree and five or more years of experience, and by producing anecdotal evidence, e.g., that employer has made racially disparaging comments. The burden of proof remains with applicant.

Applicants in this case did not even attempt to rebut Florida's evidence of choosing the most qualified. [R. 32-46-210]. This was so, not because Florida failed to

produce a reasonably specific articulation, but because Applicants did not have access to any evidence which would tend to show discrimination beyond the prima facie case assumed by the trial court. This was exceedingly clear to the factfinder after hearing and observing plaintiffs and defendants during eleven days of trial testimony. [See App. 43a-80a].

Applicants here offered no anecdotal evidence at trial and their expert statistical testimony has been fully discredited by the Eleventh Circuit. Consequently the result here, unless the trial court permits further testimony from the parties, is grossly unfair – the Applicants would be permitted recovery based only on the skimpiest prima facie evidence.

The Eleventh Circuit was wrong. Under its decision, Applicants may argue they are entitled to prevail if they present a prima facie case and the employer does not produce the subjective testimony of the actual decision-maker – notwithstanding the fact that the employer produces a wealth of non-testimonial, objective evidence of its legitimate reason, as Florida did here. To label such evidence as no evidence at all conflicts with the standards for a discrimination case. See, Petition at 15, 17, *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983). The wrongheaded reasoning of the Eleventh Circuit can best be exemplified by presenting the case regarding one applicant, Delores Colston.

Colston was terminated by Florida on April 22, 1977, at the request of Mary Singleton, a black female, for insubordination and physically abusing her supervisor. [R. 27-12; Defendant's Exhibit 8-J(2)]. Colston admitted

this at trial. [R. 27-12]. She further admitted that she had received several official reprimands. *Id.* A written reprimand was admitted into evidence and revealed criticisms of Colston's "attitude, compatibility, initiative, personality, loyalty and sincerity" [2 SR 1-9; Defendant's Trial Exhibit 8-J(1)]. Colston admitted other malfeasance on the job, e.g., that she had been reprimanded for " . . . breaking with others that I shouldn't have been breaking with". [R. 27-30]. Colston certainly did not even attempt to establish that the selectee, for any of her contested positions, had equal or inferior qualifications.

Colston brought claims for denial of appointment, to certain positions following her discharge. Colston admitted at trial that she omitted her dismissal from the subsequent employment application in question. [R. 26-19].

The trial court determined, based on the totality of the evidence, that Colston failed to rebut Florida's "articulation" that it hired the best qualified as evidenced by Colston's employment records and those of the successful candidates. [App. 76a]. The court further found that Colston failed to prove intentional discrimination. [App. 76a].

Ironically, under the Eleventh Circuit decision Colston could argue that she is entitled to prevail if she can establish a *prima facie* case, where Florida does not produce the actual decisionmaker to testify that her proclivity toward raucous and insubordinate behavior made her less qualified than the successful candidate. Such results would be patently unfair and conflict with the precedent case standards. Just as a court is not permitted

to require the plaintiff to submit direct evidence of discriminatory intent by employer, the Eleventh Circuit should not be permitted to establish a standard requiring the employer to submit direct evidence of a non-discriminatory reason. *See, Aikens*, 460 U.S. 709 (1983).

Contrary to Applicants' claim, the case here was clearly tried on the merits and was subject to review only under the clearly erroneous standard. It was the trier of fact who was in position to weigh the evidence presented by both parties and make those factual determinations necessary to enter judgment. [*See*, App. 20a-80a].

A discrimination trial should be no different than trials based on other types of claims wherein certain facts may be used to establish a rebuttable presumption. The party faced with a presumptive fact is simply required to come forward with evidence to rebut that presumption, not a specific type of evidence. The quality of the evidence goes to the ultimate issue of intent as the *Mills* court, *supra*, explained. The burden of *proof* remains upon the plaintiff. A fundamental error here is the seeming confusion of the burden of production with the burden of proof. Under *Burdine* standards, as further defined in *Aikens*, the employer maintains a *burden to produce* evidence of a legitimate motive. The plaintiff at all times maintains the *burden of proof*. Once the presumption drops from the discrimination case it is the factfinder who must decide the ultimate issue: whether defendant intentionally discriminated against plaintiff. Unless clearly erroneous, that decision should not be disturbed upon review by return to a stage by stage analysis. [*See* Petition at 14-18].

For each claim here which Applicants could identify, Florida established: a) that the Applicant maintained a negative employment record, whereas selectee did not; *or* b) that selectee had generically superior educational and experience credentials; *or* c) that selectee had favorable friendship or political connections. [App. 43a-79a]. These relative qualifications were either evident on the face of the employment record or established through witness testimony. A mystery did not surround the employment decisions, contrary to the suggestion in the decision below. It is somehow ludicrous to suggest that a decision-maker's ten-year-old recollections are acceptable whereas facially clear documentary evidence and explanations of employment policy are not. Further evidence does not exist – and indeed Applicants presented no record cite – that a decisionmaker's notes concerning subjective impressions are maintained in Florida's records, as Applicants contend. [Respondent's Brief at 13].

The claims here involved office positions. Florida's assertion that the best qualified individual was chosen, combined with Florida's production of documents which revealed, e.g., that selectee had either a) more education, b) more experience in a given field, c) that the rejected Applicant had a history of malingering, altercations with the public, or d) unsatisfactory evaluations by minority evaluators. [See, e.g., R. 26-16 (evidence that Rosa Henderson received conditional and unsatisfactory evaluations from black evaluators)], was specific enough to fulfill the employer's burden. Often, the testimony by Applicants at trial enabled the trial court to verify the validity of documented inadequacies of a particular applicant – e.g. the

trial court's finding that Rosa Henderson had demonstrated a "bad attitude" in court and that conduct was consistent with the defendants' position at trial. [See App. 70a-74a]. The Eleventh Circuit was wrong to establish that this quantity of evidence did not constitute a successful articulation because subjective decisionmakers' testimony was not included.

CONCLUSION

The Eleventh Circuit was clearly wrong in its devaluation of objective and documentary evidence in conflict with the precedent cases of this Court and the decisions in other circuits. The balance of shifting burdens in the discrimination arena should not be weighted to favor the complainant over the employer. Certiorari should be granted for plenary review or in the alternative, to vacate and reverse or remand.

Respectfully submitted,

RICHARD M. DUNN
Counsel of Record

BARBARA A. EAGAN
DUNN, DRESNICK & LODISH, P.A.
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2 South Biscayne Boulevard
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